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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION,

Petitioner,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether California's statutes limiting campaign contributions, violate the First or Fourteenth Amendments of the United States Constitution because, by employing a fiscal-year basis for measuring campaign contributions, rather than the election-cycle basis of analogous federal statutes, the California statutes "tend to discriminate" against challengers as a class.

2. Whether California's statutes limiting campaign contributions violate the First or Fourteenth Amendments of the United States Constitution.

3. Whether California's statutes prohibiting inter-candidate transfers of campaign contributions violate the First Amendment of the United States Constitution as infringements on freedom of expression.

4. Whether California's statutes prohibiting contributions among a candidates own committees constitute unconstitutionally burdensome infringements on First Amendment rights.

LIST OF PARTIES

Plaintiffs in the proceedings below, and Respondents before this Court, are Service Employees International Union, AFL-CIO, CLC; California State Council of Service Employees/COPE; California Teachers Association; California Teachers Association for Better Citizenship Political Action Committee; Committee to Protect the Political Rights of Minorities; Willie L. Brown; Willie Brown Campaign Committee; Friends of David Roberti; Friends of John Burton; John Burton; Alice Huffman; Michael Ross; and Allen Ruby. Defendant in the proceedings below was the California Fair Political Practices Commission.

Plaintiff Intervenor below, and Respondent before this Court, is the California Democratic Party, an incorporated association.

Defendant Intervenors below, and Respondents before this Court, are Quentin L. Kopp and Ross Johnson.

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Petitioner California Fair Political Practices Commission respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered on February 7, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 955 F.2d 1312, and is reprinted in the Appendix beginning at A-1 through A-36.

The opinions of the United States District Court for the Eastern District of California (Karlton, D.J.) are reported at 721 F.Supp. 1172 and 747 F.Supp. 580, and are reprinted at A-70 through A-88 and A-37 through A-69, respectively.

JURISDICTION

Plaintiffs filed their action below in the United States District Court for the Eastern District of California, invoking federal jurisdiction under 28 U.S.C. §§ 1131, 1343(a)(3), 2201, and 2202. Plaintiffs' motion for partial summary judgment and for limited injunctive relief was thereafter granted. *Service Employees Intern. Union, AFL-CIO v. F.P.P.C.*, 721 F.Supp. 1172 (E.D.Cal. 1989); A-37. Judgment was entered by the district court on September 26, 1990. *Service Employees Intern. Union, AFL-CIO v. F.P.P.C.*, 747 F.Supp. 580 (E.D.Cal. 1990); A-70.

On appeal by respondents, the Ninth Circuit on February 7, 1992, entered judgment affirming the judgment of the district court. *Service Employees Intern. Union, AFL-CIO v. F.P.P.C.*, 955 F.2d 1312 (9th Cir. 1992); A-1. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of Ninth Circuit is conferred by 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Plaintiffs challenged the constitutional validity of Proposition 73, an initiative measure adopted by the people of the State of California in 1988. Statutes added or amended by Proposition 73 which are pertinent to the instant proceedings read as follows:

Cal. Gov. Code, § 85100.

> This chapter shall be known and cited as the "Campaign Contribution Limits Without Taxpayer Financing Amendments to the Political Reform Act."

Cal. Gov. Code, § 85102.

> The following terms as used in this chapter have the following meanings:
>
> **(a)** "Fiscal year" means July 1 through June 30.
>
> **(b)** "Person" means an individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, association, committee, and labor organization.
>
> **(c)** "Political committee" means a committee of persons who receive contributions from two or

more persons and acting in concert makes contributions to candidates.

(d) "Broad based political committee" means a committee of persons which has been in existence for more than six months, receives contributions from one hundred or more persons, and acting in concert makes contributions to five or more candidates.

(e) "Public moneys" has the same meaning as defined in Section 426 of the Penal Code.

Cal. Gov. Code, § 85200.

Prior to the solicitation or receipt of any contribution or loan, an individual who intends to be a candidate for an elective office shall file with the commission a statement signed under penalty of perjury of intention to be a candidate for a specific office.

Cal. Gov. Code, § 85201.

(a) Upon the filing of the statement of intention pursuant to Section 85200, the individual shall establish one campaign contribution account at an office of a financial institution located in the state.

(b) Upon the establishment of an account, the name of the financial institution, the specific location, and the account number shall be filed with the commission within 24 hours.

(c) All contributions or loans made to the candidate, to a person on behalf of the candidate, or to the candidate's controlled committee shall be deposited in the account.

(d) Any personal funds which will be utilized to promote the election of the candidate shall be deposited in the account prior to expenditure.

(e) All campaign expenditures shall be made from the account.

Cal. Gov. Code, § 85202.

(a) A candidate may only accept contributions from persons, political committees, broad based political committees, and political parties and only in the amounts specified in Article 3 (commencing with Section 85300). A candidate shall not accept contributions from any other source.

(b) All contributions deposited into the campaign account shall be deemed to be held in trust for expenses associated with the election of the candidate to the specific office for which the candidate has stated, pursuant to Section 85200, that he or she intends to seek or expenses associated with holding that office.

Cal. Gov. Code, § 85300.

No public officer shall expend and no candidate shall accept any public moneys for the purpose of seeking elective office.

Cal. Gov. Code, § 85301.

(a) No person shall make, and no candidate for elective office, or campaign treasurer, shall solicit or accept any contribution or loan which would cause the total amount contributed or loaned by that person to that candidate, including contributions or loans to all committees controlled by the candidate, to exceed one thousand dollars ($1,000) in any fiscal year.

(b) The provisions of this section shall not apply to a candidate's contribution of his or her personal funds to his or her own campaign contribution account.

Cal. Gov. Code, § 85302.

No person shall make and no political committee, broad based political committee, or political party shall solicit or accept, any contribution or loan from a person which would cause the total amount contributed or loaned by that person to the same political committee, broad based political committee, or political party to exceed two thousand five hundred dollars ($2,500) in any fiscal year to make contributions to candidates for elective office.

Cal. Gov. Code, § 85303.

(a) No political committee shall make, and no candidate or campaign treasurer shall solicit or accept, any contribution or loan which would cause the total amount contributed or loaned by that committee to that candidate for elective office or any committee controlled by that candidate to exceed two thousand five hundred dollars ($2,500) in any fiscal year.

(b) No broad based political committee or political party shall make and no candidate or campaign treasurer shall solicit or accept, any contribution or loan which would cause the total amount contributed or loaned by that committee or political party to that candidate or any committee controlled by that candidate to exceed five thousand dollars ($5,000) in any fiscal year.

(c) Nothing in this Chapter shall limit a person's ability to provide financial or other support to one or more political committees provided the support is used for purposes other than making contributions directly to candidates for elective office.

Cal. Gov. Code, § 85304.

No candidate for elective office or committee controlled by that candidate or candidates for elective office shall transfer any contribution to any other candidate for elective office. Transfers of funds between candidates or their controlled committees are prohibited.

Cal. Gov. Code, § 85306.

Any person who possesses campaign funds on the effective date of this chapter[1] may expend these funds for any lawful purpose other than to support or oppose a candidacy for elective office.

STATEMENT OF THE CASE

The "Campaign Contribution Limits Without Taxpayer Financing Amendments to the Political Reform Act" (hereafter, Proposition 73 or the Act) was adopted by the voters of California as an initiative measure at election on June 7, 1988. Provisions of the Act limiting political contributions became effective on January 1, 1989. Cal. Gov. Code, § 85104.

[1] January 1, 1989.

Plaintiffs filed an original petition seeking relief directly from the California Supreme Court. That petition was denied without comment on March 1, 1989. On March 24, 1989, plaintiffs filed a complaint for declaratory and injunctive relief in the United States District Court for the Eastern District of California. Plaintiffs sought a declaration that the fiscal year basis for measuring campaign contributions was unconstitutionally discriminatory; they sought invalidation of the Act's ban on inter-candidate and "intra-candidate" transfers; and Plaintiffs sought invalidation of the Act's "carry-over" limitation.

On September 24, 1989, the district court granted plaintiffs' motion for partial summary judgment, declaring that "California Government Code section 85306 violates the First Amendment of the United States Constitution." A-88. Section 85306 prohibited the "carry-over" of campaign funds accumulated prior to January 1, 1989 to support or oppose a candidacy for elective office. One pupose of the provision was to eliminate the financial advantage which incumbents would have over challengers upon the effective date of the contribution limits. The district court concluded that section 85306[2] was effectively a limitation on campaign expenditures and that, although the statute seeks to address the problem of political corruption or the appearance of corruption, it does not do so in fact and is overbroad in any event. A-70 to A-88.

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[2] Unless otherwise indicated, all statutory references are to the California Government Code.

Pursuant to the declaration of constitutional invalidity, the district court enjoined enforcement of the statute. The judgment was appealed to the Ninth Circuit by Defendants in Intervention, Quentin L. Kopp and Ross Johnson.

Having struck down section 85306, the "carry-over" provision of the Act, as unconstitutionally aiding *challengers*, the district court proceeded to strike down the contribution limits for the reason that they unconstitutionally aided *incumbents*.

On September 25, 1990, the district court filed 208 findings of fact which are reproduced in the Appendix accompanying this petition. A-89 to A-122. On September 26, 1990, the district court filed its conclusions of law based on those findings of fact. A-37 *et seq*. Therein, the court reasoned that, because, as a matter of practice, incumbents can and do raise more money than do challengers, therefore the Act "tends to" discriminate against challengers because it will still be likely that incumbents will raise more money than challengers for an election campaign. See Finding 155, A-114. The district court held that, "[a]ll contribution limitations measured on a fiscal year basis violate the provisions of the First Amendment to the Constitution of the United States and are hereby declared unenforceable." A-69.

Having declared the Act's contribution limitations to be unconstitutional, the district court reasoned that the Act's prohibitions against transfers of campaign funds from one candidate, or committee, to another must fall *perforce*. A-68.

On appeal, the Ninth Circuit affirmed. A-25. Like the district court, the circuit court struck down the contribution limits and the inter-candidate transfer ban on the grounds that these provisions "tend to discriminate" against challengers. The instant petition followed.

REASONS FOR GRANTING THE PETITION

I.

THE PETITION SHOULD BE GRANTED BECAUSE BOTH THE DISTRICT COURT AND THE CIRCUIT COURT MANIFESTLY APPLIED AN INCORRECT "ADVERSE IMPACT" ANALYSIS TO TEST THE CONSTITUTIONAL VALIDITY OF THE CONTRIBUTION LIMITATIONS

The Ninth Circuit's decision rests entirely on a vague "finding of fact" by the district court: "Proposition 73's use of contribution limits keyed to the fiscal year, rather than to particular elections, tends to discriminate against challengers by exacerbating the discrimination inherent in the limits themselves." Finding 155, A-114. The Ninth Circuit paraphrased the finding: "The district court found that Proposition 73's fiscal year contribution limits tend to discriminate against challengers as a class." A-9. It is therefore only because the fiscal-year basis assertedly "*tends* to discriminate" against challengers as a class that the district court and the court of appeals struck down the contribution limits altogether.

Petitioner is aware of no authority for the proposition that courts may strike down a statute on Fourteenth

Amendment grounds because the statute "*tends* to discriminate."[3] Indeed, such a finding of discriminatory "tendency" is not even a finding of *effective*, if unintentional, discrimination, which this Court has consistently found to be an insufficient basis for invalidating a facially neutral and otherwise lawful statute. *Washington v. Davis*, 426 U.S. 229, 242 (1976); *see also, Buckley v. Valeo*, 424 U.S. 1, 31 (1976) ("[a]bsent record evidence of invidious discrimination against challengers as a class, a court should generally be hesitant to invalidate legislation which, on its face, imposes evenhanded restrictions"); *City of Mobile v. Bolden*, 446 U.S. 55, 66-67 (1980) ("only if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment").

Accordingly, the petition should be granted to correct the lower courts' improper reliance on "adverse impact" analysis as a basis for striking down a statute on the ground that the statute is unconstitutionally discriminatory.

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[3] The circuit court's reliance on *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972), *Carey v. Brown*, 447 U.S. 455 (1980), *Minneapolis Star v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), and *Austin v. Michigan Chamber of Commerce*, 110 S.Ct. 1391 (1990), is patently misplaced. Each of those decisions reviewed a statute which was *intentionally* discriminatory on its face.

II.

THE PETITION SHOULD BE GRANTED BECAUSE, NOT ONLY DID THE LOWER COURTS EMPLOY AN IMPROPER TEST, BUT NEITHER COURT IDENTIFIED ANY ACTUAL DISCRIMINATORY EFFECT RESULTING FROM ENFORCEMENT OF PROPOSITION 73'S CONTRIBUTION LIMITATIONS

The district court and the circuit court purported to characterize Proposition 73's contribution limitations as unconstitutionally discriminatory in their application. Of course, there was no evidence before the courts of Proposition 73's actual effect on election campaign financing; the "application" of the statute was a hypothetical model predicated upon statistical data from elections conducted *without* limits on campaign contributions, or from federal elections conducted under per-election limitations. The circuit court rejected petitioner's objection that this methodology did not satisfy the requirements of article III of the United States Constitution as recently reconfirmed by this Court in *Renne v. Geary*, 111 S.Ct. 2331 (1991). A-13, n. 9.

However, despite reliance on the conjecture of political analysts, neither the district court nor the circuit court was able to state categorically that the Act's contribution limits, or the fiscal year basis on which contributions are measures, *actually* and *necessarily* discriminates against challengers as a class. At best, the courts could say only that the statute "tends" to do so.

The district court purports to have found the "invidious" discrimination in the statute's fiscal-year basis for measuring campaign contributions. This fiscal-year basis, said the district court, "tends to discriminate

against challengers *by exacerbating the discrimination inherent in the limits themselves.*" Finding 155, A-114 (emphasis added).

The court did not explain what discrimination "inheres" in contribution limits, although it might be supposed that the district court was referring to the "natural" advantages possessed by incumbents in election campaigns. The circuit court stated that, "it was not these advantages that the [district] court held to violate the First Amendment. It was the *additional* advantages to incumbents created by Proposition 73's fiscal year provisions that the court ruled unconstitutional." A-14, n. 10 (italics in original).

Neither the district court nor the circuit court majority could articulate precisely what "additional advantages" were created for incumbents by Proposition 73. However, an explanation of the theory of decision can be found in Judge Wiggins' dissent:

> The district court found that incumbents are likely to raise more money than challengers in non-election years, in part because challengers begin their campaigns later. Thus, the district court and majority theorize that Proposition 73 disadvantages challengers by preventing them from overcoming their late fundraising start and narrowing the contribution gap in the election year.

A-29 (Wiggins, J., dissenting). This was, in essence, the argument of appellees before the circuit court. *See* A-5.

However, the theory was obviously fallacious. As Judge Wiggins observed:

> This theory is absurd given that on average incumbents consistently receive more contributions than challengers in election years. Because incumbents are more likely to receive contributions in excess of Proposition 73 limits, even in election years, the net effect of Proposition 73 is to narrow rather than exacerbate the fundraising gap between incumbents and challengers.
>
> Moreover, in those campaigns where incumbents are raising funds in early non-election years but challengers are not, Proposition 73 helps challengers by reducing the amount incumbents might otherwise raise in such circumstances. Given that this fundraising gap already exists and will continue to exist with or without Proposition 73, challengers are much better off with contribution limits to reduce the amounts incumbents raise before challengers begin their campaigns.

A-30 (Wiggins, J., dissenting).

Accordingly, not only did the lower courts improperly employ an "adverse impact" analysis for purposes of testing the constitutional validity of Proposition 73, but the courts failed to identify any actual discriminatory effect. For this reason, too, the petition should be granted. S. Ct. R. 10.1(a).

III.

THE PETITION SHOULD BE GRANTED BECAUSE, IN ANY EVENT, THE FACTUAL PREDICATE FOR THE DISTRICT COURT'S FINDING OF A "TENDENCY" TO DISCRIMINATE IS NO LONGER VALID

On November 6, 1990, the voters of California adopted "The Political Reform Act of 1990." Most

significantly, Proposition 140 limited the number of terms which any person may serve in a California legislative or constitutional office. Under Proposition 140, effective November 7, 1990, Assemblymembers may serve only three two-year terms in that office; Senators newly elected on November 6, 1990 may serve only two four-year terms in that office. Cal. Const., art. IV, § 2(a). The ban on re-election to an office beyond the maximum number of terms permitted is a lifetime ban. *Legislature v. Eu*, 54 Cal.3d 492, 503-506 (1991), *cert. denied* 112 S.Ct. 1292 (1992).

Proposition 140 was adopted after issuance of the district court's judgment in this case but while the matter was pending before the Ninth Circuit. However, the effectiveness of the initiative measure was immediately called into question when the California Supreme Court granted an original petition for the purpose of considering a challenge to the measure as invalid on both federal and state constitutional grounds. Although the state supreme court ultimately upheld the validity of measure's term limitations, *Legislature v. Eu, supra*, in view of the manifest novelty of the issue, the State's ability to implement the term-limit provisions of Proposition 140 was not settled until the denial of certiorari by this Court on March 9, 1992 – after issuance of the decision by the circuit court.

Following this Court's denial of certiorari, the political landscape of California changed dramatically, and the relationship between fundraising and challenges to an incumbent officeholder immediately became a matter of pure conjecture. Quite obviously, the statistical data and

expert opinions relied upon by the district court in finding that Proposition 73's contribution limitations "tend" to discriminate against challengers presently have little, if any, predictive validity in the "post-140" political context.

Following Proposition 140, no incumbent Assemblymember is permitted to hold that office for more than six consecutive years; no incumbent Senator is permitted to hold that office for more than eight consecutive years. Thus, incumbents who have served four years in any legislative or constitutional office become "lame ducks" if reelected to another term in that office, i.e., they cannot again be re-elected to the office.[4] Term limitations *guarantee* frequent "open" races for elective office, i.e., races in which the incumbent is not a contestant.

Under the new state constitutional scheme, it may be that there will be few "mid-term" challenges to incumbent officeholders, i.e., efforts to unseat officeholders prior to the mandated expiration of the maximum term limit. This may result in lower campaign contributions to incumbents, inasmuch as large campaign "war chests"

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[4] The district court found that, "[a]mong other reasons, candidates transfer campaign funds to other candidates in aid of the transferor's goal of attaining a leadership position in the legislature," Finding 91, A-103, and "[f]undraising for other legislators is a traditional leadership duty," Finding 93, A-103. Following enactment of Proposition 140, however, the senior members of either House will be in their final term of office and will only have been in office for four years. Such individuals may prove to be far less successful as fundraisers for other candidates. The *post-140* role of the legislative leadership in fundraising for other candidates, accordingly, remains to be determined.

may no longer prove to be necessary.[5] By the same token, candidates for an office and their supporters may engage in more *long-term* fundraising, targeting the guaranteed open contests rather than focusing on "mid-term" challenges to the incumbent.[6]

In those cases where there do occur "mid-term" challenges to incumbent officeholders, it remains to be seen what effect *fundraising* by challengers will have on the challengers' ability to unseat the incumbent.[7] If there is sufficient voter dissatisfaction with the incumbent to

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[5] Under Proposition 73, transfers of contributions from an incumbent to a candidate for another office are prohibited. Cal. Gov. Code, § 85304.

[6] An Assemblymember who has served out the maximum number of terms in that House may run for another office, e.g., the Senate. However, because Proposition 73 prohibits "intra-candidate" transfers of contributions, Cal. Gov. Code, § 85304, the Assemblymember would not be permitted to transfer funds from his Assembly campaign account to his Senate campaign account. Thus the Assemblymember and other contestants in the Senate race start with a "level playing field" in terms of fundraising for the Senate campaign.

[7] The district court found that, "[b]ecause they start at a disadvantage, challengers running against incumbents must raise and spend a considerable amount of money to reach a threshold level of name recognition and image necessary to make the race competitive. . . . " Finding 122, A-108. However, following enactment of Proposition 140, an incumbent in a contest for re-election to any legislative or constitutional office will have served, at most, only four years in that office; it is not clear that, under such circumstances, the incumbent's "name recognition" or "image" will be so significantly different from those of a challenger. Indeed, with the advent of term limitations, many challengers for one office may previously have served in one or more other state elective offices.

make a "mid-term" challenge credible at all, it may be the case that a comparatively small campaign account will be sufficient to prevail in the election against the incumbent.[8] It may also be that, in such a case, a challenger's efforts at fundraising may be far more successful than those of the incumbent, reducing the "gap" in fundraising that might normally be expected to result from the "normal advantages" of incumbency.[9]

On the other hand, if there is *insufficient* voter dissatisfaction to make "mid-term" replacement of the incumbent a realistic possibility, it may be that a challenger would not likely amass more than the statute's contribution limits in any event. Furthermore, in such a case, the inability of a challenger to unseat the incumbent may have little to do with the comparative size of their campaign accounts.

The district court found that "[i]ncumbents running for office generally enjoy a substantial advantage over challengers because they ordinarily have greater resources, name-recognition, access to the media, and a

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[8] Accordingly, the district court's Finding 124, A-108, is of questionable *present* validity.

[9] Furthermore, after enactment of Proposition 140, some of the "natural advantages" of incumbency no longer exist or are significantly diminished. For example, the district court found that California legislators enjoy a resource advantage in being able to expend state funds for district staff offices. Finding 120, A-108. Such resources, however, have been significantly reduced by virtue of Proposition 140, which cut the Legislature's operating budget by 38% and imposed an expenditure ceiling at that level. *Legislature v. Eu, supra*, 54 Cal.3d at 502; Cal. Const., art. IV, § 7.5.

greater ability to raise money," which "are generally the result of being in office and the likelihood that they will remain in power." Finding 118, A-107. However, whether or not supported by the evidence presented *at that time*, the *present* validity of this finding is necessarily called into question, since, under California's newly amended constitution, incumbencies are invariably short-lived. It might turn out that, because of the comparatively short durations of incumbency following Proposition 140, the "natural advantages" of incumbency that typically accumulate over *several* years of service will prove to be less significant in future California elections.[10]

Plaintiffs challenged Proposition 73 *as applied* – the statutes are obviously facially neutral – and plaintiffs' proof below thus rested entirely upon statistical data and expert opinion concerning the comparative fundraising needs and capabilities of incumbents and challengers. *See* Finding 154, A-113. However, even were it the case that the lower court properly applied an "adverse impact" methodology, the political environment in California from which plaintiffs' statistics and opinions were abstracted plainly bears no reasonable resemblance to the

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[10] Another factor which, in conjunction with contribution limits and term limits, might significantly reduce the "natural advantages" of incumbents in California legislative races is the fact that legislative district boundaries have recently been redrawn by the California Supreme Court. *Wilson v. Eu*, 1 Cal.4th 707 (1992). It has been suggested that much of the "natural advantage" that incumbent legislators have previously enjoyed in California resulted from politically "gerrymandered" legislative district lines. *See Badham v. Eu*, 694 F.Supp. 664 (N.D. Cal. 1988).

political environment in California following enactment of Proposition 140.

Accordingly, it is presently immaterial whether the contribution limits could be said to have a demonstrable and constitutionally cognizable "tendency" adversely to affect challengers – *based on fundraising data antedating the November 1992 election.*[11] If the district court would enjoin *future* enforcement of California's contribution limits based on a statistical "adverse impact" methodology, as the district court plainly purports to do, A-69, then the district court must necessarily determine that the contribution limits are unconstitutionally discriminatory *under the conditions as they exist after enactment of Proposition 140.* In the absence of such a determination, there is presently no valid basis for declaring the contribution limits *presently* to be unconstitutional, and there is, therefore, no *presently* valid basis for enjoining *future* enforcement of those limits.

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[11] No Assemblymember elected in November 1990 will be barred from seeking reelection until the election of November 1996. Cal. Const., art. XX, § 7. However, during his or her last two-year term, no Assemblymember will be fundraising for reelection to that office. Thus, Assemblymembers elected in November 1990 will be competitors with challengers for campaign funds only for the November 1992 and the November 1994 races.

No Senator elected in November 1990 will be barred from seeking reelection to another four-year term until the election of November 1998. *Id.* However, during his or her second four year term, no incumbent Senator will be fundraising for reelection to that office. Thus, Senators elected in November 1990 will be competitors with challengers for campaign funds only for the November 1994 race.

The Court is respectfully requested to grant the petition for certiorari for the purpose of remanding the matter to the district court for reconsideration in light of the amendments to the California Constitution effected by Proposition 140. *See Omaha Nat. Bank v. Nebraskans for Independent Banking, Inc.*, 426 U.S. 310 (1976).

IV.

THE PETITION SHOULD BE GRANTED BECAUSE THE LOWER COURTS IMPROPERLY STRUCK DOWN PROPOSITION 73's BANS ON TRANSFERS OF CAMPAIGN CONTRIBUTIONS

Proposition 73 precludes transfers of campaign contributions among a candidate's own committees and between candidates. Cal. Gov. Code, § 85304. The circuit court agreed with the district court that the statute's ban on "intra-candidate" transfers operates as an expenditure limitation rather than a limitation on contributions, "because it limits the purposes for which money raised by a candidate may be spent." A-22. No analysis is provided, nor will one be found in the district court's opinion, which merely makes the bald assertion, "[i]t is clear that the ban acts as an expenditure limitation." A-61.

Petitioner disputes that a prohibition against the transfer of campaign funds *by* a candidate or a committee controlled by that candidate *to* the candidate or to another committee controlled by that candidate is an "expenditure" limitation that so burdens contributors' first amendment rights as to invoke the protections of the

First Amendment. The petition should be granted to resolve this important question. S. Ct. R. 10.1(c).[12]

The lower courts also struck down the Act's *inter-candidate* transfer bans, reasoning that this prohibition had no justification once the contribution limits were struck down. A-24. The circuit court also concluded that the ban was not narrowly drawn to further the State's

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[12] Not only does the changed political environment following Proposition 140 destroy the probative value of the statistical predicate for the district court's finding of discriminatory "tendency," but the changed circumstances also compel re-evaluation of the public interest in Proposition 73's transfer bans. See A-23. As the district court acknowledged, "the interest which may be tendered as a sufficient justification to subordinate an individual's right of free speech need not reflect the original legislative motive." *Service Employees*, 747 F.Supp. at 586; A-49, citing *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 (1983).

Proposition 140 was expressly intended to eliminate the corrupting effects of incumbency, Cal. Const., art. IV, § 1.5, a compelling public interest. *See Legislature v. Eu, supra*, 54 Cal.3d at 520. The intra-candidate transfer ban arguably furthers this interest by prohibiting a last-term incumbent in one office from transferring the funds in his or her present campaign account to a campaign account for election to a new office. Thus, for example, a last-term Assemblymember would not be permitted to transfer her Assembly campaign fund to her Senate campaign fund. Furthermore, the transfer ban will reduce corruption and the appearance of corruption. Continuing with the example: The intra-candidate campaign ban will ensure against the practice of making campaign contributions to an Assemblymember for the purpose of furthering a later Senate campaign, in return for a quid-pro-quo if the member is later elected to the Senate.

interest in preventing corruption or the appearance of corruption. A-25.

The district court found that, "[a]mong other reasons, candidates transfer campaign funds to other candidates in aid of the transferor's goal of attaining a leadership position in the legislature." Finding 91, A-103. The court found, "[f]undraising for other legislators is a traditional leadership duty." Finding 92, A-103. Finally, the district court found that, "[t]ransfers of contributions from party leadership may give the appearance to some members of the public aware of the practice that a candidate or officeholder will vote consistent with the wishes of the party leadership." Finding 94, A-103. Such "power brokering," the building of "an entrenched, dynastic, legislative bureaucracy," was the target of Proposition 140. *Legislature v. Eu, supra,* 54 Cal.3d at 520; *cf., Finding 191, A-119; Finding 198, A-120.*

The petition for certiorari should accordingly be granted to correct the circuit court's conclusion that the statute's intra-candidate transfer ban is an unconstitutional limitation on campaign expenditures and to correct that court's conclusion that the statute's inter-candidate transfer ban is not narrowly tailored to serve a compelling public interest. S. Ct. R. 10.1(c).

V.

THE COURT MAY SUMMARILY DISPOSE OF THE PETITION ON THE MERITS

It is within the authority of the Court summarily to dispose of this petition on the merits. S. Ct. R. 16.1. Such a summary disposition would be justified here, inasmuch

as the lower courts plainly applied an improper "adverse impact" standard in concluding that Proposition 73 was unconstitutionally discriminatory. *See Mireles v. Waco*, 112 S.Ct. 286 (1991); *City of Los Angeles, et al. v. Heller*, 475 U.S. 796 (1986); *Great Western Sugar Co. v. Nelson*, 442 U.S. 92 (1979).

The challenged contribution limits of Proposition 73 are manifestly neutral. Accordingly, it would be appropriate for the Court summarily to reverse the judgment of the circuit court with directions to remand the cause to the district court for entry of judgment in favor of defendants.

However, should the Court decline to do so, the Court may nevertheless reverse the judgment of the circuit court with directions to remand the cause to the district court for reconsideration in light of the intervention of significant amendments to the California Constitution, *Omaha Nat. Bank v. Nebraskans for Independent Banking, Inc., supra*, 426 U.S. 310; *see also, Bureau of Economic Analysts v. Long*, 454 U.S. 934 (1981), and for the purpose of applying the correct standard in testing whether or not the contribution limits discriminate against challengers in violation of the Fourteenth Amendment. *Washington v. Davis, supra*, 426 U.S. 229, 242.

CONCLUSION

For the reasons stated, the petition for certiorari should be granted.

Dated: May 6, 1992

Respectfully submitted,

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Service Employees International Union, AFL-CIO, CLC; California State Council of Service Employees/COPE; California Teachers Association; California Teachers Association for Better Citizenship Political Action Committee; Committee to Protect the Political Rights of Minorities; Willie L. Brown; Willie L. Brown Campaign Committee; Friends of David Roberti; Friends of John Burton; John Burton; Alice Huffman; Michael Ross; Allen Ruby, Plaintiffs-Appellees, California Democratic Party, an incorporated association, Plaintiff in Intervention-Appellee, v. Quentin L. Kopp; Ross Johnson, Defendants-Intervenors-Appellants, and Fair Political Practices Commission, Defendant-Intervenor.

Service Employees International Union, AFL-CIO, CLC; California State Council of Service Employees/COPE; California Teachers Association; California Teachers Association for Better Citizenship Political Action Committee; Committee to Protect the Political Rights of Minorities; Willie L. Brown; Willie L. Brown Campaign Committee; Friends of David Roberti; Friends of John Burton; John Burton; Alice Huffman; Michael Ross; Allen

Ruby, Plaintiffs-Appellees, California Democratic Party, an incorporated association, Plaintiff-Intervenor-Appellee, v. Fair Political Practices Commission, Defendant-Appellant, and Quentin L. Kopp; Ross Johnson, Defendants-Intervenors.

No. 89-15771, No. 90-16200, No. 90-16372

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

955 F.2d 1312

Appeal from the United States District Court for the Eastern District of California. D.C. No. CV-89-0433-LKK. Lawrence K. Karlton, District Judge, Presiding.

Argued and Submitted
April 23, 1991 – San Francisco, California
Submission Vacated May 2, 1991
Resubmitted May 15, 1991

Filed February 7, 1992

Before: Cecil F. Poole, William A. Norris and Charles Wiggins, Circuit Judges.
Opinion by Judge Norris;
Dissent by Judge Wiggins

COUNSEL

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Bradley S. Phillips, Munger, Tolles & Olson, Los Angeles, California, for the amici curiae for Commmon [sic] Cause.

OPINION

NORRIS, Circuit Judge:

This appeal requires us to decide the constitutionality of certain provisions of Proposition 73, a campaign financing reform measure for elections to state and local offices that was approved by California voters in 1988.[1] Appellants are the California Fair Political Practices Commission ("FPPC"), which was named as a defendant in the action below, and the authors of Proposition 73, Assemblyman Ross Johnson and Senator Quentin Kopp ("Authors"), who intervened as parties defendant. Appellees are the Service Employees International Union, other labor organizations, elected officials, and individual campaign contributors, the plaintiffs that brought the action, and the California Democratic Party, which intervened as a party plaintiff.

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[1] That Proposition 73 was enacted directly by the voters rather than by the state legislature does not change our constitutional analysis. "Voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation." *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 295 (1981).

Proposition 73 limits the amount individuals and groups may contribute to candidates for state and local office each fiscal year.[2] Appellees do not, however, focus their constitutional attack on Proposition 73's contribution limits per se. Instead they focus on the fact that Proposition 73 limits the amount a contributor may give during each fiscal year rather than following the federal model[3] of limiting the amount a contributor may give

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[2] The Contribution limitations provide that a "person" may contribute up to $ 1,000 to a candidate each fiscal year. Cal. Gov't Code § 85301(a). A "person" is defined as "an individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, association, committee, and labor organization." *Id.* § 85102(b).

A "political committee" may contribute up to $ 2,500 to a candidate each fiscal year. Id. § 85303(a). A "political committee" is defined as "a committee of persons who receive contributions from two or more persons and acting in concert makes contributions to candidates." *Id.* § 85102(c).

A "broad based political committee" or political party may contribute up to $ 5,000 to a candidate each fiscal year. Id. § 85303(b). A "broad-based political committee" is defined as "a committee of persons which has been in existence for more than six months, receives contributions from one hundred or more persons, and acting in concert makes contributions to five or more candidates." *Id.* § 85102(d).

Finally, a "person" may contribute up to $ 2,500 per fiscal year to a political committee, broad-based political committee, or political party for the purpose of contributing to a candidate. *Id.* § 85302.

[3] The Federal Election Campaign Act of 1971, as amended, limits to $ 1,000 the amount a person may give "to any candidate and his authorized political committees with respect to any election for Federal office." 2 U.S.C. § 441a(1)(A). It limits

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during each election cycle. Appellees argue that in tying the contribution limits to fiscal years, Proposition 73 discriminates in favor of incumbents and their supporters and against challengers and their supporters for a very practical reason: Challengers do not typically decide to run for office years in advance of the election. As a result, they are unable to engage in fundraising during each fiscal year between elections as incumbents commonly do. Thus, for example, an incumbent state legislator may tap an individual contributor for $ 1,000 in each fiscal year of her four-year term, while a potential opponent cannot realistically do the same until the fiscal years in which the primary and general elections occur. As a result, appellees conclude, Proposition 73 effectively limits the contributions of an individual who chooses to support a non-incumbent to $ 1,000 in each of two fiscal years, while an individual who chooses to support an incumbent may contribute $ 1,000 in each of four fiscal years.

After a six-day bench trial, the district court agreed with appellees that limiting contributions on a fiscal year basis unconstitutionally discriminated against challengers. The district court found that incumbents "raise substantial amounts of money each of the years of incumbency, while as a general matter challengers cannot, and

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to $ 5,000 the amount a multicandidate political committee may contribute "to any candidate and his authorized political committees with respect to any election for Federal office." Id. § 441a(2)(A). The term "election" is defined to include general, special, primary, and runoff elections. *Id.* § 431(1)(A).

generally do not, do so." *Service Employees International Union v. Fair Political Practices Commission*, 747 F. Supp. 580, 588 (E.D. Cal. 1990). Because the district court held that the fiscal year provisions of Proposition 73 were not severable from the contribution limitations themselves, it struck down the contribution limitations under the First and Fourteenth Amendments and permanently enjoined their enforcement. *Id.* at 593-94.

Appellees also challenged three provisions of Proposition 73 in addition to the fiscal year contribution limitations. First, appellees challenged Proposition 73's carryover provision, which prohibits the expenditure of campaign funds raised prior to January 1989. On a partial motion for summary judgment, the district court held that this provision constituted an unconstitutional expenditure limitation and permanently enjoined its enforcement. *Service Employees International Union v. Fair Political Practices Commission*, 721 F. Supp. 1172 (E.D. Cal. 1989).

Appellees also challenged Proposition 73's ban on intra-candidate transfers: transfers of funds between controlled committees of a single candidate. Cal. Gov't Code § 85304. After trial, the court held that this provision was also an unconstitutional expenditure limitation. *Service Employees International Union*, 747 F.Supp. at 591. Finally, appellees challenged Proposition 73's ban on inter-candidate transfers: transfers of funds between candidates. Cal. Gov't Code § 85304. Analyzing this provision as a contribution limitation as opposed to an expenditure limitation, the district court ruled that the ban was unconstitutional because it served no purpose once Proposition

73's contribution limitations had been declared unconstitutional. 747 F. Supp. at 591-93. The district court permanently enjoined enforcement of both the intra-candidate and the inter-candidate transfer bans. *Id.* at 593-94.[4]

Appellants defend the constitutionality of every provision of Proposition 73, except that appellant FPPC does not appeal the district court's invalidation of the carry-over ban.

I

Before we consider the question whether limiting campaign contributions on a fiscal year basis unconstitutionally discriminates in favor of incumbents and against challengers, we must first address two threshold questions raised by appellants: (1) that appellees lack standing to raise the question of discrimination against challengers because none of them is a challenger,[5] and (2) that the district court's findings of fact on the issue of discrimination are clearly erroneous. *See* Fed. R. Civ. P. 52(a).

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[4] After the district court issued its ruling, appellants asked the court to stay its injunction pending appeal. The court issued a partial stay for state legislative campaigns only. Appellants' motion for a stay of the remaining portions of the injunction was denied by both the Ninth Circuit and the United States Supreme Court.

[5] Appellants do not appear to question appellees' standing to challenge the transfer bans or the carry-over ban.

A

Appellants argue that appellees lack standing to question the constitutionality of a law that discriminates against challengers because no appellee is a challenger. However, we reject this argument because appellees have standing to assert their own rights as contributors. As the district court pointed out, 747 F. Supp. at 588, the Supreme Court held in *Buckley v. Valeo* that contributing money is an act of political association that is protected by the First Amendment because the act of contributing serves to associate the contributor with a candidate as well as with like-minded contributors. 424 U.S. 1, 22 (1976) (per curiam). If Proposition 73 discriminates against challengers by limiting their opportunities to accept contributions, then it necessarily discriminates against contributors who wish to associate themselves with challengers. Appellees therefore have standing to assert their own associational rights and to challenge the fiscal year contribution limits as discriminatory. *See Renne v. Geary*, 111 S. Ct. 2331, 2338 (1991) ("Respondents of course have standing to claim that [a law] has been applied in an unconstitutional manner to bar their own speech.").

B

We now turn to appellants' argument that the district court's finding of fact on the issue of discrimination are clearly erroneous.[6] The district court found that

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[6] The district court attempted to address every request for a finding made by any party. The result was a total of 208

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Proposition 73's fiscal year contribution limits tend to discriminate against challengers as a class. Finding 155. While "[i]ncumbents raise a significant amount of their campaign funds early in an election cycle," challengers "raise very little money early in the election cycle. Most challengers do not decide to run until relatively late in the cycle because the prospects for success, which depend on national or state trends and information about the incumbent, cannot be assessed years in advance of the election." Findings 128, 129. The court went on to find that this difference between challengers and incumbents leads to great disparities in fundraising during non-election years:

> In state races in the off-years 1983, 1985, and 1987, all incumbents, but very few challengers, engaged in fundraising . . . . In statewide constitutional office races in the off-years 1983 and 1985, incumbents outraised challengers by an average of almost 9 to 1. In state Senate races in the off-years 1983, 1985 and 1987, incumbents outraised challengers by an average of more than 40 to 1. In State Assembly races in the off-years 1983, 1985 and 1987,

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findings of fact. 747 F. Supp. at 581. We need not review the findings of fact that are not relevant to whether Proposition 73 discriminates against challengers and their supporters by limiting their opportunities for association. For example, the district court's decision was based in part on its findings that Proposition 73 prevented challengers from reaching threshold levels of funding necessary to mount viable campaigns. *See id.* at 588 & n.19. Because we do not rest our decision on that ground, we need not decide whether those findings are clearly erroneous.

> incumbents outraised challengers by an average of more than 70 to 1.

Finding 133.

We reject appellants' contention that these findings are clearly erroneous.[7] The district court's findings are

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[7] Federal Rule of Civil Procedure 52(a) provides that "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses." Fed. R. Civ. P. 52(a). "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985).

Judge Wiggins maintains that the district court's finding of discrimination should be reviewed de novo. *See* Dissent at 1354. However, the Supreme Court has repeatedly held that a district court's ultimate finding of discrimination as well as the subsidiary findings on which it is based are reviewed for clear error. *See, e.g., Anderson*, 470 U.S. at 573-76 (employment discrimination); *Rogers v. Lodge*, 458 U.S. 613, 622-23 (1982) (voting rights discrimination); *Pullman-Standard v. Swint*, 456 U.S. 273, 287-290 (1982) (employment discrimination). The Court has explicitly rejected the line between ultimate and subsidiary facts that Judge Wiggins would have us draw. *Pullman-Standard*, 456 U.S. at 287 ("Rule 52(a) . . . does not divide findings of fact into categories; in particular, it does not divide findings of fact into those that deal with 'ultimate' and those that deal with 'subsidiary' facts.").

Rule 52(a) requires deference to the district court's findings of fact not just because the district court is in a better position to evaluate the facts but also in the interests of conserving judicial resources and the resources of the parties. *Anderson*, 470 U.S. at 574-75. "[T]he parties to a case on appeal

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derived from the testimony of two expert witnesses, Professors Gary Jacobson and Bruce Cain. Jacobson's testimony was based on his study of campaign finance and the fundraising patterns of incumbents and challengers in elections for congressional offices. *See* 2 Reporter's Transcript ("RT") at 271, 274. Cain's testimony was based on his study of campaign finance in general, as well as Plaintiffs' Trial Exhibit 6, an examination of contribution patterns in several California legislative and statewide elections. See 3 RT at 407, 412-13; Appellees' Supplemental Joint Excerpts of Record ("ASJER"), Tab B.

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have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much." *Id.* at 575. Even if Judge Wiggins were correct that we are in as good a position to review the evidence as the district court, we are not free to review it de novo.

If, as Judge Wiggins suggests, we were to ignore Anderson, Rogers, and Pullman-Standard and treat the district court's finding of discrimination as a mixed question of law and fact, we would still review for clear error because the application of law to fact to determine the existence of discrimination is "essentially factual." *United States v. McConney*, 728 F.2d 1195, 1202 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984). Whether the discrimination worked by Proposition 73's fiscal year contribution limitations is unconstitutional is a legal question which "involve[s] the exercise of judgment about the values underlying legal principles." *Id.* But whether Proposition 73's fiscal year contribution limitations discriminate – whether they treat challengers and incumbents differently to the disadvantage of one or the other – is essentially a factual question.

Professor Jacobson testified that challengers "tend to raise their money later in the campaign," 2 RT at 299-300, because "challengers often don't decide until relatively late whether or not to make a race." *Id.* at 301.[8] Challengers wait, Jacobson testified, because the prospects for success cannot meaningfully be assessed two or three years before an election. *Id.*

Professor Cain prepared a report of fundraising in California based on FPPC annual reports that documented vast disparities between incumbents and challengers during the off years. ASJER, Tab B, at 6. This report supports Finding 133 as well as more general findings about fundraising patterns. Like Jacobson, Cain testified that "fund raising in the off years is primarily an incumbent activity." 3 RT at 413. Specifically, Cain noted that while few challengers "have even begun to fund raise in the off year," incumbents had "raised significant fractions of their money in the off year, and indeed raised about half of it in the first six months of the election cycle." *Id.* He testified that few challengers even begin to think about running before the end of the off-year period, "let alone make the final decision and raise money." *Id.* at 421-22. Thus, the testimony of Professors Jacobson and Cain provides ample evidentiary support for the district court's crucial finding that proposition 73's fiscal year contribution limits discriminate against challengers as a class.

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[8] Jacobson testified that in California congressional races in 1988, incumbents outraised challengers by a ratio of 9 to 1 prior to June 30th. After June 30th, the ratio dropped to 2 1/2 - 3 to 1. 2 RT at 300.

Appellants characterize the expert testimony as speculative because it was not based on elections conducted with proposition 73's contribution limitations in effect.[9] Appellants' argument is unpersuasive. The district court was not required to discount the testimony of Professors Cain and Jacobson merely because their data was not collected after Proposition 73 went into effect. Experts may make reasonable projections of future harm based on reliable data collected under similar circumstances and they need not wait to measure the actual discriminatory effects of a law for their testimony to have probative value. Indeed, in *Buckley,* the Court relied on data taken prior to the enactment of the federal contribution and expenditure limitations. *See, e.g., Buckley, 424 U.S. at 21 n.23.*

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[9] Subsequent to oral argument, Proposition 73's authors have sought to recharacterize this as a ripeness argument. Relying on the Supreme Court's decision in *Renne v. Geary,* 111 S. Ct. 2331 (1991), they argue that without data based on the actual operation of Proposition 73 this case is not ripe for decision. *Renne,* however, is readily distinguishable. In *Renne,* the Court held that a challenge to Article II, § 6(b) of the California Constitution prohibiting political endorsement of candidates for nonpartisan offices was not ripe where the record gave "no reason to believe that § 6(b) had any impact on the conduct of those involved." *Id.* at 2339. In *Renne,* nothing in the record indicated that any action had been taken to enforce § 6(b). *Id.* Here, however, the district court found that the FPPC had acted to enforce the provisions of Proposition 73 challenged in this action. Finding 12. Moreover, § 6(b) apparently provided for no criminal enforcement. 111 S. Ct. at 2339. By contrast, the California Political Reform Act, which Proposition 73 amends, does subject violators to criminal liability. Cal. Gov't Code § 91000.

C

Having determined that appellees have standing to challenge the fiscal year contribution limits and that the district court's findings of fact on the issue of discrimination are not clearly erroneous, we now turn to the question whether viewpoint and content neutral contribution limits that discriminate against challengers and their supporters offend the Constitution. In *Buckley,* the Court upheld the constitutionality of federal contribution limits based on an election cycle. *See supra* note 3. The Court, however, refrained from deciding the constitutionality of contribution limits that discriminate against challengers because the record contained no evidence of "invidious discrimination against challengers as a class." 424 U.S. at 31.

However, the Court in *Buckley* did address the issue of discrimination in the context of expenditure limitations. The government asserted an interest in leveling the political playing field by limiting expenditures, which in practice had the effect of burdening expressive activities of the wealthy to a greater degree than those of the poor. In rejecting this argument, the Court said: "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Id.* at 48-49 (1976).[10] Thus, *Buckley* teaches that government

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[10] Citing this language from *Buckley,* appellants argue that the district court based its ruling on an impermissible equality of wealth theory. Their argument is misdirected. The district court found that incumbents start with significant advantages.

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must remain scrupulously neutral when regulating expressive activities protected by the First Amendment. Moreover, a line of other Supreme Court cases from *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972), to *Austin v. Michigan Chamber of Commerce*, 110 S. Ct. 1391 (1990), firmly establishes the principle that discrimination is permissible in the First Amendment context only when the discrimination is itself necessary to achieve a substantial governmental interest.[11] Our court has reaffirmed this

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However, it was not these advantages that the court held to violate the First Amendment. It was the *additional* advantages to incumbents created by Proposition 73's fiscal year provisions that the court ruled unconstitutional.

[11] Discrimination in the First Amendment context has sometimes been characterized as a violation of the First Amendment itself, *see Simon & Schuster, Inc. v. New York State Crime Victims Board*, 112 S. Ct. 501, 508 (1991); *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 227 (1987); *Carey v. Brown*, 447 U.S. 455, 471 (1980) (Stewart, J., concurring); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 785-86 (1978); *Buckley*, 424 U.S. at 49, and has sometimes been characterized as a violation of the Equal Protection Clause, *see Carey*, 447 U.S. at 461; *Mosley*, 408 U.S. at 94-95; see also *Austin*, 110 S. Ct. at 1401-02 (upholding differential treatment under equal protection analysis). Under either analysis, however, independent justification of the discrimination is required.

In dissent, Judge Wiggins maintains that Proposition 73's fiscal year contribution limitations may not be held unconstitutional absent some evidence of purposeful discrimination. *See* Dissent at 1354-55. While a showing of discriminatory purpose has been required in the context of racial discrimination, *see Washington v. Davis*, 426 U.S. 229, 240-42 (1979), it has not been required to establish a constitutional violation in the context of

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principle only recently. Harwin v. Goleta Water District, No. 90-55105, slip op. at 17199 (9th Cir. Dec. 30, 1991).

In *Mosley*, the Court struck down a Chicago ordinance that prohibited picketing on school grounds except for labor picketing. The *Mosley* Court recognized that Chicago could legitimately "prohibit[ ] some picketing to protect public order," 408 U.S. at 98, and that "[c]ities certainly have a substantial interest in stopping picketing which disrupts a school." *Id.* at 99. Thus, the question in *Mosley* was not whether Chicago could burden expressive activity, but whether it could do so in a discriminatory manner. The answer, the Court held, depended on whether the discrimination itself was necessary to achieve the city's purposes. "[T]he crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment." *Id.* at 95. The answer in *Mosley* was no. Chicago had not shown that non-labor picketing was "clearly more disruptive" than labor picketing. *Id.* at 100. The legitimate governmental interest that could support a general burden on expressive activity did not justify a selective burden on such activity.

In *Carey v. Brown*, 447 U.S. 455 (1980), the Court relied upon *Mosley* in striking down an Illinois statute that prohibited the picketing of residences but exempted "the

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the First Amendment. Indeed, the Supreme Court has just this term reaffirmed that " '[i]llicit legislative intent is not the sine qua non of a violation of the First Amendment.' " *Simon & Schuster*, 112 S. Ct. at 509 (quoting *Minneapolis Star v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 592 (1983)).

peaceful picketing of a place of employment involved in a labor dispute." *Id.* at 457. While recognizing that "[t]he State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society," *id.* at 471, the Court held that this interest would not support an exclusion for labor picketing. "[N]othing in the content-based labor-nonlabor distinction has any bearing whatsoever on privacy." *Id.* at 465. Because the discrimination served no substantial governmental interest, the statute was unconstitutional.

While both *Mosley* and *Carey* involved content based discrimination, other cases establish that even viewpoint and content neutral statutes that discriminate violate the Constitution unless the discrimination is itself necessary to serve a legitimate government interest. In *Minneapolis Star v. Minnesota Commissioner of Revenue,* 460 U.S. 575 (1983), the Court struck down a state law that taxed purchases of paper and ink in excess of $100,000 per year. *Id.* at 578 n.2. While the tax was facially neutral, in practice it fell on only a small number of newspapers. *Id.* at 578-79. This, the Court held, was impermissible. *Id.* at 591-92. Although the Court recognized that Minnesota's interest in raising revenue was "critical," *id.* at 586, that interest did not justify levying a tax on some newspapers but not others.[12]

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[12] More recently the Court has invalidated two laws that were viewpoint neutral but discriminated on the basis of content. In *Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221 (1987), the Court struck down a tax on magazines that exempted religious, professional, trade, and sports magazines.

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While each of these cases speaks to the issue of discrimination in the First Amendment context, the case that is most directly on point is *Austin v. Michigan Chamber of Commerce,* 110 S. Ct. 1391 (1990). *Austin* requires that when a statute regulating political campaigns discriminates against a class of participants in the political process, the discrimination must be independently justified, even where the statute is viewpoint and content neutral. The statute at issue in Austin prohibited corporate expenditures in elections for state office except expenditures made from segregated funds. *Id.* at 1395. Thus, it burdened the First Amendment rights of corporations more heavily than the rights of others but was viewpoint and content neutral. The Court upheld the Michigan law, but only because the discriminatory treatment of corporations was itself necessary to serve "the

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Id. at 224. Arkansas' interest in raising revenue, the Court held, "does not explain selective imposition of the sales tax on some magazines and not others." *Id.* at 231. In *Simon & Schuster, Inc. v. New York State Crime Victims Board,* 112 S. Ct. 501 (1991), the Court struck down a New York law requiring that a criminal's income from literary works describing the crime be deposited in a fund to pay claims from the victims. The Court held that "[i]n order to justify such differential treatment [based on content] 'the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.' " *Id.* at 509 (quoting *Arkansas Writers' Project,* 481 U.S. at 231). Although the Court ultimately held the statute invalid because it was overinclusive, the Court noted that the statute's distinction between assets derived from literary activities and a criminal's other assets "has nothing to do with the State's interest in transferring the proceeds of crime from criminals to their victims." *Id.* at 510.

compelling state interest of eliminating from the political process the corrosive effect of political 'war chests' amassed with the aid of the legal advantages given to corporations." *Id.* at 1401. Thus, *Austin* confirms that discrimination is permissible in the context of the First Amendment only if the discrimination itself is necessary to serve a substantial governmental interest.

In sum, *Buckley, Mosley, Austin,* and the other cases we have discussed establish that government must remain scrupulously neutral when it regulates activity protected by the First Amendment. The Court has not hesitated to strike down laws that are facially neutral but have a discriminatory impact on First Amendment rights. *See Minneapolis Star,* 460 U.S. at 591-92. The government may deviate from its neutral role only when it can satisfy a heightened standard of judicial scrutiny.[13]

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[13] Whether analyzed under the First Amendment or under the Equal Protection Clause of the Fourteenth Amendment, *see supra* note 11, discriminatory burdens on First Amendment rights have typically been subjected to strict scrutiny. *Simon & Schuster,* 112 S. Ct. at 509 ("in order to justify . . . differential treatment, 'the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.' "); *Austin,* 110 S. Ct. at 1401 (discriminatory classification "must be narrowly tailored to serve a compelling governmental interest"); *Arkansas Writers' Project,* 481 U.S. at 231 ("In order to justify . . . differential taxation, the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end."); *Mosley,* 408 U.S. at 101 (Equal Protection Clause requires that distinctions among speakers be "narrowly tailored to their legitimate objectives."). Strict scrutiny is required even when the challenged law is viewpoint and content neutral. See *Austin,* 110 S.

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Appellants argue that Proposition 73's contribution limits serve the compelling governmental interest in preventing corruption and the appearance of corruption. Although this interest will support some limits on political contributions, *Buckley*, 424 U.S. at 26-28, appellants have made no showing that limiting contributions on a fiscal year basis advances this interest in any way. Thus, this case is much like *Mosley*. In *Mosley*, the Court recognized that Chicago had a legitimate interest in limiting picketing to prevent the disruption of schools but held that this governmental interest would not support a discriminatory ban on picketing. Here, we recognize that the state has a legitimate interest in preventing corruption and the appearance of corruption, but hold that this interest will not support a discriminatory formula for limiting contributions. In this case, as in *Mosley*, "the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment." *Mosley*, 408 U.S. at 95. In both cases, the answer is no.

D

The district court held that the fiscal year feature of Proposition 73 is not severable from the contribution

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Ct. at 1401. While it is conceivably arguable that a lower level of scrutiny should apply to discriminatory contribution limits because contribution limits are subject to a lower level of scrutiny than expenditure limits, *see Buckley*, 424 U.S. at 20-21, 23, we need not decide this question today because appellants assert no governmental interest whatsoever that is served by the discriminatory fiscal year provisions themselves.

limits themselves. We agree. Appellants have given us no reason to believe that "the legislation would have been enacted if it had not included the unconstitutional provision[ ]." *National Advertising Co. v. Town of Babylon*, 900 F.2d 551, 557 (2d Cir.) (citing *United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968)), *cert. denied*, 111 S. Ct. 146 (1990). As the district court pointed out, were we simply to strike the word "fiscal" from the statute, contribution limits would still be measured on an annual basis, raising the same problems of discrimination. 747 F. Supp. at 590. Were we to rewrite the statute to limit contributions on an election cycle basis, we would be at a loss to know what the dollar amounts of the limitations should be. In short, to save the statute, we would have to rewrite it substantially, "a practice that is decidedly disfavored." *Id.* (citing *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 764-65 (1986). Accordingly, we affirm the district court's decision that all of Proposition 73's contribution limits that are measured on a fiscal year basis are constitutionally infirm.[14]

II

Having concluded that Proposition 73's contribution limits based on a fiscal year are unconstitutional, we

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[14] Because the $5,000 limit on contributions from a broad based political committee or political party and the $2,500 limit on contributions to a political committee or political party for the purpose of contributing to a candidate include the impermissible fiscal year provision, we find them unconstitutional on that basis. We therefore find it unnecessary to consider the argument of appellee California Democratic Party that these contribution limits act as an impermissible expenditure limitation.

consider whether its ban on inter- and intra-candidate transfers likewise violate the First and Fourteenth Amendments.[15] The district court's decision invalidating these provisions was not grounded on their discriminatory effect, and appellees have not argued on appeal that the transfer bans are discriminatory.[16] We therefore shift from the discrimination analysis used in part I to a straightforward application of the tests for contribution and expenditure limitations enunciated in *Buckley* and its progeny.

A

We agree with the district court that the ban on intra-candidate transfers operates as an expenditure limitation because it limits the purposes for which money raised by a candidate may be spent.[17] Expenditure limitations are subject to strict scrutiny and will be upheld only if they

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[15] Proposition 73 requires candidates to use a single bank account and campaign committee for the office they seek, and to make all campaign expenditures from that committee's account. Cal. Gov't Code § 85201. Section 85202(b) stipulates that contributions are held in trust, expendable only for the office for which a candidate has declared. Finally, § 85304 prohibits transfers of funds between candidates or their controlled committees.

[16] At the district court level, appellees did assert that the ban on inter-candidate transfers discriminated against minority candidates. However, the district court did not base its decision on evidence that the inter-candidate transfer ban discriminated against either challengers or minority candidates. *See* 747 F. Supp. at 591-93.

[17] Appellants do not appear to dispute that the intra-candidate transfer ban operates as an expenditure limitation.

are "narrowly tailored to serve a compelling state interest." *Austin*, 110 S.Ct. at 1396.

Appellant FPPC asserts that the ban is justified by the government's interest in preventing funds from being raised for one office and spent for another. Even if we were to recognize this to be a compelling state interest, we would invalidate the ban as violative of the First Amendment because it is not narrowly-tailored. We agree with the district court that this interest in ensuring that contributors are not mislead could be sewed simply by requiring candidates to inform contributors that their contributions might be spent on other races. 747 F.Supp. at 591. Concerns about the unintended use of contributors' money can be met "by means far more narrowly tailored and less burdensome than [a] restriction on direct expenditures: simply requiring that contributors be informed that their money may be used for such a purpose." *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 261 (1986). We hold, therefore, that the intra-candidate transfer ban fails the narrowly-tailored prong of the strict scrutiny test.[18]

B

We turn now to the inter-candidate transfer ban, which, in contrast to the intra-candidate ban, operates as

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[18] Appellants Johnson and Kopp, the authors of Proposition 73, also cite the government's interest in maintaining a stable political system. However, they fail to explain how the intra-candidate transfer ban advances that interest. *Compare Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 226 (1989).

a contribution limitation because it limits the amount one candidate may contribute to another. The Supreme Court has applied a somewhat less stringent test than strict scrutiny to decide the constitutionality of contribution limitations. *Buckley*, 424 U.S. 20-21, 23; *see also Massachusetts Citizens for Life*, 479 U.S. at 259-60 ("We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending."). However, the test is still a "rigorous" one. *Buckley*, 424 U.S. at 29. Proposition 73's ban on inter-candidate transfers may be sustained, therefore, only if the state "demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *Id.* at 25.

The FPPC asserts that the inter-candidate transfer ban is necessary to prevent contributors from circumventing the contribution limits by funneling contributions through one candidate to another. As the district court pointed out, 747 F.Supp. at 593, the inter-candidate transfer ban cannot serve this purpose in the absence of valid contribution limits.

The Authors argue that the inter-candidate transfer ban may be justified by the state's interest in preventing corruption or the appearance of corruption by "political power brokers." Brief of Defendants in Intervention-Appellants [Amended] at 49. Even if we assume this to be an important state interest, the ban is not "closely drawn to avoid unnecessary abridgement of associational freedoms." *Buckley*, 424 U.S. at 25. The potential for corruption stems not from campaign contributions per se but from large campaign contributions. *Id.* at 28. The inter-

candidate transfer ban prohibits small contributions from one candidate to another as well as large contributions. We hold, therefore, that the inter-candidate transfer ban is unconstitutional because it fails the "rigorous" test used in *Buckley*. 424 U.S. at 29.

III

Finally, we consider Proposition 73's prohibition on the expenditure of funds raised prior to January 1989. The Authors, but not the FPPC, appeal the district court's invalidation of this provision.[19]

The Authors concede that the ban on the use of pre-1989 funds operates as a restriction on expenditures. As an expenditure limitation, the ban on pre-1989 funds must be "narrowly tailored to serve a compelling state interest." *Austin*, 110 S.Ct. at 1396. The only purpose of the ban advanced by the Authors is to purge previously unregulated contributions from a regulated system under Proposition 73. Given our decision that Proposition 73's contribution limits are invalid, this purpose is no longer served by the prohibition on the expenditure of pre-1989 funds.

The judgment of the district court is AFFIRMED.

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[19] Unlike the other provisions at issue in this appeal, the prohibition on the expenditure of funds raised prior to January 1989 was invalidated on a partial motion for summary judgment. However, because the Authors have not asserted on appeal that any genuine issue of fact exists that would preclude summary judgment, we are presented with a pure question of law.

WIGGINS, Circuit Judge Dissenting:

The majority's remarkable opinion is best understood by examining the interests of the parties in this litigation. The plaintiff/appellee in this case is the Service Employees International Union, AFL-CIO, a special interest group classified as a person under Proposition 73 and subject to the $1,000 contribution limitation. *See* Cal. Gov't Code §§ 85102(b), 85301(a). There is no doubt that Proposition 73 will severely limit the Service Employees International Union's campaign contributions. The Union is represented by Rencho, Johansen & Purcell, a law firm that has a long relationship with the California Democratic Party and has served as counsel to the California Democrats. Indeed, the California Democratic Party itself has joined this suit as a plaintiff in intervention, undemocratically placing itself in direct opposition to a majority of the voters in California. When this suit was filed on March 24, 1989, 24 members (60%) of the California Senate were Democrats, while 15 were Republicans and 1 was independent, and 47 members (59%) of the California State Assembly were Democrats, while 32 were Republicans. Thus, the California Democratic Party had a strong interest in keeping its incumbents in office and retaining control of the State Assembly and Senate.

The Union, the Democratic Party, Democratic incumbents, and other plaintiffs with closely related interests brought this challenge to Proposition 73 before Judge Karlton. 747 F.Supp. at 581. Incredible as it may seem, the plaintiffs, who would be disadvantaged by Proposition 73 because it harms incumbents and special interests, argued that Proposition 73 was unconstitutional because it

discriminates against *challengers*.[20] Judge Karlton accepted this unbelievable argument and struck down Proposition 73 as unconstitutional. Now Judge Poole and Judge Norris sanction this argument on appeal.

The majority determines that Proposition 73 is nothing more than invidious discrimination against challengers, while ignoring the district court's conflicting findings showing that Proposition 73 usually works against incumbents and therefore benefits challengers. The majority then cloaks its decision as a finding of fact that this court should be hesitant to disturb. This treatment of the district court's decision as a sacrosanct finding of fact is instructive. Because the majority decision cannot stand on its own merit, the decision is justified by suggesting that we must follow the district court's conclusion unless that conclusion was *clearly* erroneous.

To the contrary, I maintain that whether Proposition 73 works an invidious and unconstitutional discrimination on challengers and their supporters is a conclusion of law. At a minimum, this issue is a mixed question of law and fact. Thus, the district court's conclusion is not entitled to any special deference. *See United States v. Spillone*,

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[20] None of the plaintiffs in this case are themselves challengers. Indeed, it appears that the interests of the plaintiffs in this case are closely identified with incumbents and actually conflict with the interests of challengers. Thus, the defendants argue that the plaintiffs in this case lack standing to argue on behalf of challengers as a class.

However, rather than force the plaintiffs to find a nominal challenger and begin again, I agree with the majority that the plaintiffs have standing as contributors who may wish to contribute to a challenger in a given election.

879 F.2d 514, 520 (9th Cir. 1989) (mixed questions of law and fact are reviewed de novo).

The district court's conclusion that Proposition 73 discriminates against challengers is not a finding of fact but an ultimate conclusion "to be distinguished from the findings of primary, evidentiary or circumstantial facts." *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 491 (1937), *cited with approval in United States v. McConney*, 728 F.2d 1195, 1202 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984). The relevant factual findings are undisputed, and the discrimination conclusion turns on the legal interpretation of the undisputed facts.[21] This court is in just as good a position as the district court to review the facts and determine whether Proposition 73 works an unconstitutional discrimination on challengers.

Even if we assume, however, that the supposed discrimination is a finding of fact, it would still be clearly erroneous. The record is completely barren of any evidence of invidious discrimination. Proposition 73 limits campaign contributions to reduce both corruption and the appearance of corruption in the California political system. Findings of Fact 46 & 47. The contribution limitations are based on a July 1 through June 30 fiscal year to correspond to California's June primaries. Thus, a contributor who gave the maximum allowable contribution to a candidate in the primary may make another contribution for the general election as soon as the primary is over. *See* 747 F.Supp. at 589. At trial, the plaintiffs failed

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[21] More precisely, the discrimination issue turns on whether we utilize all of the relevant, undisputed facts in our legal analysis instead of a select few.

to produce any evidence that this system was a result of invidious or purposeful discrimination. At most, the plaintiffs show that the fiscal year provision may have a disparate effect on some challengers. Standing alone, however, a disparate impact does not establish invidious discrimination. *See Washington v. Davis*, 426 U.S. 229, 242 (1979).

Moreover, the record in this case demonstrates that Proposition 73 helps rather than harms challengers. There is ample evidence suggesting that on the whole the contribution limits in this case favor challengers by disproportionately burdening incumbents. When the district court's findings are reviewed together, it is clear that any negative effects a fiscal year basis may have on challengers are overcome by the benefits challengers receive from contribution limits.

In its findings of fact, the district court made findings demonstrating that incumbents are more likely than challengers to receive contributions in excess of Proposition 73 limits: "In the three general election years immediately preceding the effective date of Proposition 73, incumbents in contested California legislative races received a greater percentage of contributions in excess of the limits established by Proposition 73 than did their challengers." Finding of Fact 87. Thus, the overall effect of Proposition 73 is to narrow the gap between incumbent and challenger fundraising.

The district court found that incumbents are likely to raise more money than challengers in non-election years, in part because challengers begin their campaigns later.

Thus, the district court and majority theorize that Proposition 73 disadvantages challengers by preventing them from overcoming their late fundraising start and narrowing the contribution gap in the election year. This theory is absurd given that on average incumbents consistently receive more contributions than challengers in election years. Because incumbents are more likely to receive contributions in excess of the Proposition 73 limits, even in election years, the net effect of Proposition 73 is to narrow rather than exacerbate the fundraising gap between incumbents and challengers.

Moreover, in those campaigns where incumbents are raising funds in early non-election years but challengers are not, Proposition 73 helps challengers by reducing the amount incumbents would otherwise raise in such circumstances. Given that this fundraising gap already exists and will continue to exist with or without Proposition 73, challengers are much better off with contribution limits to reduce the amounts incumbents raise before challengers begin their campaigns.

By striking down Proposition 73 because it supposedly disadvantages challengers, the majority eliminates contribution limits and places challengers in an even more disadvantageous position. Indeed, the majority disingenuously bolsters its decision by comparing Proposition 73 with an alternative that does not exist.

There are three basic alternatives for regulating campaign contributions presented in the context of this case. The first alternative – no limits on contributions – is the most advantageous to incumbents and harmful to challengers because on average incumbents receive more

large contributions The second alternative – Proposition 73 – benefits challengers because it places limits on contributions and narrows the fundraising gap between challengers and incumbents. The third alternative – contribution limits based on election cycles (the federal model)[22] – may be even more advantageous to challengers. It would still help to reduce the advantage incumbents obtain by receiving more large campaign contributions, while also allowing challengers to receive more money from contributors in election years to the extent those contributors did not contribute earlier in the campaign (usually because the challengers did not start their campaigns earlier).

The majority's decision rests primarily on the conclusion that the third alternative is more advantageous to challengers than Proposition 73. At bottom, the majority's conclusion is that Proposition 73 unconstitutionally discriminates against challengers because it is not as advantageous to challengers as contribution limits on an election cycle basis (the federal model) would be.

The problem with this reasoning is that the third alternative is a strawman alternative. The voters of California adopted Proposition 73, not the federal model. Although the federal model may be even more advantageous to challengers, Proposition 73 is still better for challengers than the first alternative of no contribution limits at all. Nevertheless, because the majority focuses

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[22] A system of contribution limits based on election cycles is the federal model that withstood constitutional challenge in *Buckley v. Valeo*, 424 U.S. 1 (1976). The federal model is codified at 2 U.S.C. §§ 431-455 (1988).

on the federal model, they reach the incredible conclusion that a law which benefits challengers by helping to close the fundraising gap between incumbents and challengers is unconstitutional because it discriminates against challengers. The very groups that would be harmed most by contribution limits – special interests and incumbents – are able to avoid Proposition 73 through the disingenuous argument that it discriminates against challengers.

Even more trouble than the majority's reasoning, however, is the majority's disregard for Supreme Court precedent. The Supreme Court has made it clear that "a court should generally be hesitant to invalidate [campaign contribution] legislation which on its face imposes evenhanded restrictions." *Buckley v. Valeo*, 424 U.S. 1, 31 (1976). A record showing invidious discrimination against challengers will rebut the general presumption of validity, but the record in this case simply does not show that Proposition 73 discriminates against challengers. As discussed above, the identical to the reasoning in *Buckley*, "to the extent that incumbents generally are more likely than challengers to attract very large contributions, [Proposition 73's] ceiling has the practical effect of *benefiting* challengers as a class." 424 U.S. at 32 (emphasis added). Moreover, even if Proposition 73 could be viewed as discriminatory, there is simply no showing of any *invidious* discrimination.

At best, the plaintiff/appellees in this case show that some challengers may be disadvantaged in some elections. However, the evidence shows that in most elections Proposition 73 actually disadvantages incumbents and benefits challengers. Again, similar to *Buckley*, "the

record provides no basis for predicting that such adventitious factors will invariably and invidiously benefit incumbents as a class." *Id.* at 33.

Like the federal model at issue in *Buckley*, Proposition 73's "primary purpose – to limit the actuality and appearance of corruption resulting from large individual campaign contributions" – is a sufficiently compelling interest to justify interference with protected rights. 424 U.S. at 26. To overcome the evils associated with large campaign contributions,[23] it is necessary that the rights of incumbents, special interests, contributors, and even challengers will be burdened to some extent. Under *Buckley's* First Amendment discrimination analysis, these burdens are constitutional unless the contribution limitation "invariably and invidiously" discriminates against one class for the benefit of another. *Id.* at 33. Thus, to survive the constitutional challenge in this case, it is enough that

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[23] Elimination of actual and apparent corruption associated with large campaign contributions is an especially compelling interest in California given the influence and bribery scandals that have plagued the state capital the last four years. In February 1990, Senator Joseph Montoya, D-Whittier, was sentenced to prison after he was acquitted of two bribery charges but found guilty of racketeering. Recently, Senator Alan Robbins, D-Van Nuys, is reported to have agreed to plead guilty to political corruption charges and help prosecute other corrupt politicians. Robbins reportedly admitted his guilt after federal agents produced recordings in which "Robbins suggested that both he and some of his colleagues wanted substantial campaign contributions in return for legislative favors." Robert Gunnison, Susan Sward, and Bill Wallace, *Sen. Robbins Resigns in Corruption Probe*, S.F. Chron., Nov. 20, 1991, at A16, col. 3.

Proposition 73 (1) serves its corruption-fighting purpose and (2) does not place challengers in a worse position.

Apparently, the majority believes that campaign contribution limitations are unconstitutional unless every part of the limitation is carefully tailored to benefit challengers. Although Proposition 73 actually benefits challengers and requires incumbents to bear a disproportionate share of the burden of eliminating actual and apparent corruption, the majority strikes down Proposition 73 because the fiscal year provision does not skew the balance even farther in favor of challengers. This reasoning misses the point that benefiting or harming incumbents or challengers is not a legitimate purpose for regulating campaign contributions.

Simply put, the majority's reasoning is not a faithful or even a reasonable application of *Buckley*. Indeed, to justify this same line of reasoning, the district court suggested that *Buckley* has been overruled by *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981). *See* 747 F.Supp. at 588, 589 n.20. Although the majority is not as direct as the district court, the majority shows the same disregard for the *Buckley* mandate.

Even if the majority were not overlooking Supreme Court direction, the majority's discrimination analysis would still be in error because the decision sanctions such a transparent attempt by incumbents to overcome a law that inadvertently benefits challengers. However, given the clear mandate of *Buckley*, the majority decision is especially egregious. With this decision, I believe the majority disregards the judgments of the Supreme Court and the people of California as well as common sense.

In Summary, Proposition 73 represents a balanced effort to eliminate a significant political problem – the actuality and appearance of corruption resulting from large campaign contributions. Under *Buckley's* discrimination analysis, this purpose may be served absent a showing that Proposition 73 invidiously discriminates against challengers as a class. Because (1) the record shows no invidious discrimination and (2) Proposition 73 actually benefits challengers as a class, Proposition 73 does not violate the Constitution. Incumbents and special interests should not be able to avoid this law by arguing that the law does not benefit challengers enough.[24]

I began this dissent by observing that this litigation can best be understood by examining the interests of the parties who brought it. Without question, it is an effort by the Democratic Party and its major financial supporters to strike down a measure adopted by the people of California to curtail perceived abuses in campaign financing. The majority opinion affirms the district court in finding the popularly adopted measure unconstitutional. Thus, the majority returns the law in California to where it was before Proposition 73 was enacted – no limitations on

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[24] In addition, the inter-candidate transfer ban, which the majority agrees operates as a contribution limitation, is constitutional. The reason given for invalidating the inter-candidate transfer ban is that it serves no important state interest if the accompanying contribution limitations are invalid. Because Proposition 73's contribution limitations are valid, as discussed above, the inter-candidate transfer ban does serve an important state interest by preventing the circumvention of the contribution limitations. Thus, the inter-candidate transfer ban must be upheld as well.

campaign contributions. In a most bizarre twist of reasoning, the majority permits the law to return to a condition where the maximum benefit is afforded the *incumbents*, by accepting their argument that the challenged law provides insufficient advantages to *challengers*.

It requires no special insight to conclude that this case turned out exactly as the Democratic plaintiffs intended: to preserve the seats of incumbent Democratic members of the state legislature and to insulate them from successful challenge.

SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC; et al., Plaintiffs.

v.

FAIR POLITICAL PRACTICES COMMISSION, et al., Defendants.

California Democratic Party, Plaintiff-Intervenor,

and

Quentin L. Kopp and Ross Johnson, Defendants-Intervenors.

No. CIV. S-89-433 LKK.

United States District Court, E.D. California.

Sept. 26, 1990.

747 F.Supp. 580

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Joseph Garcia, Scott Hallabrin, Fair Political Practices Com'n, Sacramento, Cal., for defendants.

Robert E. Darby, Calvin House, Fulbright & Jaworski, Los Angels, Cal., for plaintiffs in intervention.

Quentin L. Kopp, Kopp & Di Franco, San Francisco, Cal., James Ross Johnson, Sacramento, Cal., for defendants in intervention.

John Mueller, Nielsen, Merksamer, Hodgson, Parrinello & Mueller, Mill Valley, Cal., for amicus California Republican Party.

SECOND AMENDED CONCLUSIONS OF LAW

KARLTON, District Judge.

In this lawsuit, the original plaintiffs, a number of elected state officials, various campaign committees, labor organizations, and a contributor to political campaigns (sometimes hereinafter referred to as "the plaintiffs"), and the plaintiffs in intervention, the Democratic Party (hereinafter referred to as "the Democratic Party" or "the Party"), challenge certain provisions of an initiative adopted by the people of the State of California, known as Proposition 73. After trial, the court took the matter under submission.

The court has agreed to make findings as to all issues of fact which any party believes may be required to ultimately dispose of this matter. The court has set them out in a separate document entitled "Findings of Fact" because it consists of 208 discrete findings. Below, the court articulates its disposition of the case, and will advert to various of those findings as required by this opinion.

I begin with a description of the salient provisions of Proposition 73 as they pertain to this litigation.

I

THE STATUTORY SCHEME

Proposition 73 amended the existing California Political Reform Act by adding a new Chapter 5 to Title 9 of the California government Code.[1] The proposition

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[1] Unless otherwise noted, all statutory references herein are to the California Government Code.

applies to all campaigns for election to state or local office. *See* sections 82007, 82023, 82024. Although section 91005 of the Government Code imposes civil liability for violation of Proposition 73, the statute also makes criminal the knowing or willful violation of its provisions. Section 91000.

Proposition 73 seeks to regulate state elections in a variety of ways. First, it establishes limitations on campaign contributions that may be made or accepted during any fiscal year, defined as the period between July 1 and June 30. Section 85102(a). Under its provisions:

1. A "person"[2] may contribute up to $1,000 to a candidate (including all of that candidate's controlled committees) each fiscal year, section 85301(a).

2. A "political committee"[3] many [sic] contribute up to $ 2,500 each fiscal year. Section 85303(a).

3. A "broad-based political committee"[4] or political party may contribute up to $5,000 each fiscal year. Section 85303(b).

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[2] A "person" is defined to mean "an individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, association, committee, and labor organization." Section 85102(b).

[3] A "political committee" is defined as "a committee of persons who receive contributions from two or more persons and acting in concert makes contributions to candidates." Section 85102(c).

[4] "Broad-based political committee" is defined to mean "a committee of persons which has been in existence for more than six months, receives contributions from one hundred or more persons, and acting in concert makes contributions to five or more candidates." Section 85102(d).

The measure also limits to $2,500 per fiscal year contributions from a "person" to a political committee, broad-based political committee, or political party for the purpose of the entities contributing to candidates. Section 85302.

The same contribution limits noted above apply to "special elections." *See* section 85305(c). The special election limits are imposed for each special election cycle. *See* sections 85305(a) & (b). A special election cycle is defined as the period beginning with the day a vacancy in office is announced, and ending the day of the special election. Section 85305(b)(1). Proposition 73 provides for the possibility of a runoff in a special election by applying the same limits to a "special runoff election cycle." Sections 85305(b)(2), (c). Contributions permitted during a special election cycle are separate from and in addition to any contribution made during the fiscal year. Accordingly, although the normal fiscal year limit is $1,000, a person can actually contribute up to $3,000 to a candidate in a fiscal year, if the candidate is engaged in a special election and runoff.

The initiative also limits candidates to raising funds for particular offices. It provides that a candidate, before soliciting or receiving contributions, must file with the Fair Political Practices Commission "a statement signed under the penalty of perjury of intention to be a candidate for a specific office." Section 85200. Upon filing the statement, the candidate must establish a single campaign bank account, section 85201(a), and all contributions must be deposited therein and "shall be deemed to be held in trust for expenses associated with the election

of the candidate to the specific office" sought. Section 85202(b).

Finally, Proposition 73 prohibits the transfer of funds between candidates and controlled committees of a single candidate. Section 85304.

II

STATE POLITICAL RIGHTS AND THE FIRST AMENDMENT

Before there was a federal constitution the original 13 states had won the right to internal self-government by force of arms in the Revolutionary War. The creation of a federal government did not modify that right. *See Minor v. Happersett*, 88 U.S. 162, 175-76 (21 Wall.) (1875), 22 L.Ed. 627,631 ("All the States had governments when the Constitution was adopted. In all, the people participated to some extent, through their representatives elected in the manner specifically provided. These governments the Constitution did not change."). Moreover, although the federal constitution guarantees to each state a republican form of government, Art IV, § 4, that provision has been interpreted to assure the states that they would have the right to pass their own laws and form their own governments. *See Duncan v. McCall*, 139 U.S. 449, 11 S.Ct. 573, 35 L.Ed.219 (1891).[5]

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[5] By virtue of the equal footing doctrine, each new state which entered the Union enjoys the same right to self-government as the original states. *Coyle v. Smith*, 221 U.S. 559 (1911).

Despite the broad right of self-government enjoyed by the states, their conduct in that regard is not unreviewable. When the states banded together to form the United States, they limited the federal government's power to restrain various liberties by adopting as the first ten amendments to the Constitution the Bill of Rights. Those limitations were made applicable to the states themselves by the Fourteenth Amendment. *See, e.g., Stromberg v. California*, 283 U.S. 359, 368 (1931) (due process clause of Fourteenth Amendment embraces right of free speech). Accordingly,

> [w]hen a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.

Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960). *See also Baker v. Carr*, 369 U.S. 186, 229 (1962) ("When challenges to state action respecting matters of 'the administration of the affairs of the State and the officers through whom they are conducted' have rested on claims of constitutional deprivation which are amenable to judicial correction, [the Supreme Court] has acted upon its view of the merits of the claim."). Thus, a state's broad power to regulate elections "does not extinguish the state's responsibility to observe the limits established by the First Amendment rights of the state's citizens." *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, ___, 109 S.Ct. 1013, 1019, 103 L.Ed.2d 271, 281 (1989) (*quoting Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217 (1986)).

Although the defendant-intervenors make much of the fact that the statutes considered here were adopted directly through the initiative process, that happenstance provides the statute with no special insulation from review for asserted constitutional infirmity. Rather, the Supreme Court has held that "[i]t is irrelevant that the voters . . . enacted [a statute], because the voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation." *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 295 (1981).

In sum, the issues tendered by plaintiffs' challenge to Proposition 73 requires recognition of both the state's right of self-government and the overarching principles embodied in the Bill of Rights. Below I explain the relevant legal tests for resolving issues raised by this litigation.

As I have previously explained, to assess the constitutionality of a state election law when challenged on the grounds that it directly regulates rights protected by the First Amendment, a sequential analysis is required. It is first necessary to examine whether "the provisions in issue impinge upon rights protected by the First Amendment." *Service Employees Int'l Union v. FPPC* 721 F.Supp. 1172, 1175 (E.D.Cal.1989) (hereinafter "SEIU"). If so, the court must then determine "if there is a sufficiently strong governmental interest served by [the statute's] restriction on them and whether the section is narrowly tailored to the evil which may be legitimately regulated." *Id.* at 1176 (quoting *FEC v. National Conservative PAC*, 470 U.S. 480, 496, 105 S.Ct. 1459, 1468, 84 L.Ed.2d 455 (1985)); *see also Eu v. San Francisco County Democratic Central*

Committee, 489 U.S. 214, ___, 109 S.Ct. 1013, 1019-20, 103 L.Ed.2d 271, 283 (1989).

Where state statutes do not directly restrict political speech or associational rights, but do limit plaintiffs' participation in the political process, as compared to other participants, the litigation has been characterized as being a hybrid First Amendment/Equal Protection question. *See Anderson v. Celebrezze*, 460 U.S. 780, 786 n. 7, 103 S.Ct. 1564, 1569 n. 7 (1983) ("In this case, we base our conclusions directly on the First and Fourteenth Amendments and do not engage in a separate Equal Protection Clause analysis."). When such an attack is tendered, it appears that a somewhat less stringent standard applies. This court must be candid and recognize that the Supreme Court has been less than wholly successful in fixing upon a single applicable standard. The Ninth Circuit has explained, however, that in so-called "ballot access" cases, a paradigm of First/Fourteenth Amendment cases, "[n]o 'litmus paper' test exists. . . . Instead, a court must weigh (1) the character and magnitude of the asserted injury to first and fourteenth amendment rights that the plaintiff seeks to vindicate; and (2) the precise interests put forward by the State as justifications for the burden imposed by its rule," *Erum v. Cayetano*, 881 F.2d 689, 692 (9th Cir.1989).[6]

In sum, whether the statute being considered is asserted to directly limit speech or comparatively limit

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[6] Because the plaintiffs eschew a strictly Fourteenth Amendment attack on the statute (*see* footnote 11). I do not pause to analyze the standards applicable to such litigation. *See Erum*, 881 F.2d at 694.

effective participation in the electoral process, resolution of the suit requires a close examination of the restrictive effect of particular provisions and the justification tendered in support of those restrictions. A close examination of the constitutionality of the challenged provisions, however, must not be confused with an independent judgment concerning the wisdom of particular legislation. If a statute passes constitutional muster, the question of its wisdom is for the political process. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 562 (1944).

Before undertaking the requisite detailed examination of the statutes in question, it seems appropriate to set out certain general principles pertaining to the evaluation of governmental interests tendered as justifications for statutes which trench upon rights protected by the First Amendment.

III

ASSESSING LEGITIMATE GOVERNMENTAL INTERESTS

Although in their brief defendants in intervention assert diverse governmental interests in support of Proposition 73.[7] until this year, "the anti-corruption in fact and

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[7] They include "limiting the actuality or appearance of corruption . . . preserving the integrity of [the state's] election process . . . and (the) sustenances of active, alert responsibility of the individual citizen in a democracy for the wise conduct of government. . . . " Defendants in intervention's Trial Brief at p. 17.

appearance rationale [was] the only [legitimate government interest] sanctioned by the Supreme Court" in defense of political contribution and expenditure limitations. *SEIU*, 721 F.Supp. at 1177 n. 8. This past term, the High Court has identified an additional interest, namely, limiting "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Austin v. Michigan Chamber of Commerce*, ___ U.S. ___, 110 S.Ct. 1391, 1397 (1990).

Because the Court has failed to articulate any standards for identifying when asserted governmental interests are sufficiently "strong" so as to support limitations on speech, it may become increasingly difficult to predicate in advance whether a tendered interest suffices. Whatever difficulty lower courts may have in determining the sufficiency of a governmental interest under these circumstances, surprisingly little consideration has been given to the problem of identifying and characterizing governmental interests. I now briefly examine that problem.

The High Court has explained that in determining whether a statute was motivated by a constitutionally prohibited purpose, it is necessary to consider "[t]he plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history [as well as] the historical context of the statute . . . and the specific sequence of events" leading up to the statute's adoption. *Edwards v. Aguillard*, 482 U.S. 578, 594-95

(1987).[8] The criteria for discerning legislative motive, however, do not bear on the question of identifying what legitimate governmental interest is served by a statute when it is challenged as constitutionally infirm.

Both the plaintiffs and defendants have requested that the court make factual findings as to the interests served by Proposition 73, and the court has accommodated that request.[9] The court has done so because their

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[8] Of course, to speak of legislative motive, as contrasted with legislative intent, is to speak in terms of a literary device. While members of a legislative body have minds, the legislative body itself does not. Thus, to speak of "legislative motivation" is to speak in terms of a seductive metaphor. "Legislative intent," on the other hand, describes a legal term of art. It addresses the court's duty to determine what the legislative body provided for in the statute. *See Banco Mexicano de Commercio E Industria v. Deutsche Bank*, 263 U.S. 591, 602 (1924) (the legislative will must be expressed in the words it chooses).

[9] Pursuant to the parties' request the court has found as follows:

"III. GOVERNMENTAL INTERESTS SERVED BY PROPOSITION 73

> "45. The primary governmental interest assertedly served by Proposition 73 is to limit the amount of money spent in political campaigns in California.
>
> "46. Another interest assertedly served by Proposition 73 is to reduce corruption in the California political system.
>
> "47. Another interest assertedly served by Proposition 73 is to reduce the appearance of corruption in the California political system.

(Continued on following page)

belief that the issue of legitimate governmental interest is factual in character is not without case support. At least one court has held that an interest asserted must appear either in the legislation itself or there must be tendered "extrinsic evidence of such an interest." *National Advertising Co. v. Town of Babylon*, 900 F.2d 551, 555 (2d Cir.1990). The court in *Babylon* treated the identification of a governmental interest as an evidentiary issue, suggesting that in the absence of an interest declared in the statute, evidence must be tendered or at least the court must be capable of taking judicial notice of the interest. *Id.* at 556. As to the latter, that court asserted that "[a]t most, courts have taken judicial notice of a common sense linkage between a stated governmental interest and a restriction in order to assess whether . . . [the] restriction directly advance[s] the governmental interest asserted. . . . " *Id.* at 556.

With the greatest of respect to the Second Circuit and the parties, I do not agree that the issue of ascertaining a legitimate governmental interest sufficient to justify limitations on First Amendment rights is a matter for factual

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"48. Another interest assertedly served by Proposition 73 is to reduce the public perception of undue influence by contributors of large amounts of money.

"49. Another interest assertedly served by Proposition 73 is to enlarge the number of contributors to political campaigns for public office in California."

determination.[10] On the contrary, it appears to this court that the Supreme Court has treated the matter as legal in character.[11]

The High Court has held that the interest which may be tendered as a sufficient justification to subordinate an individual's right of free speech need not reflect the original legislative motive (*see* footnote 8). Thus, the advancing of "interests . . . concededly . . . not asserted when the prohibition was enacted into law" is entirely proper. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 (1983). The Court has explained that "[t]his reliance is permissible since the insufficiency of the original motivation does not diminish other interests that the restriction may now serve." *Id. See also Geary v. Renne*, 911 F.2d 280 (9th Cir. 1990) (Rymer, J. dissenting) (appropriate for court of appeals to consider interest not advanced by government); *but see In re Primus*, 436 U.S. 412, 434 n. 27

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[10] As I explain below, my analysis of how the Supreme Court has treated questions of "legitimate governmental purpose" leads me to conclude that such issues are properly characterized as "legal rather than factual." For the same reasons, I also believe that the issue may not be properly characterized as falling within the doctrine of "constitutional facts." *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 54 (1971). Constitutional facts are truly factual in character, although given their special constitutional significance, each court having jurisdiction must make an independent assessment of the findings. *Id.*

[11] As I have previously observed. "[l]aw traditionally is viewed as society's judgment as to competing values and thus a way of meaningfully ordering events in the physical universe. Facts, on the other hand, are instances in the physical universe about which judgments are made." *Famolare, Inc. v. Edison Bros. Stores, Inc.*, 525 F.Supp. 940, 943-44 n. 4 (1981).

(1978) ("Rights of political expression and association may not be abridged because of state interests asserted by appellate counsel without substantial support in the record or findings of the state court"). It seems clear that if ascertaining the governmental interest justifying a statute's limitation on speech were a matter of fact, the historical interest would be the only one cognizable. The Court's contrary holding demonstrates that the issue is legal in character, and those defending the statute are free to advocate any interest, whatever the evils the statute was originally intended to address.

While a conclusion that, in effect, the supporters of a statute attacked on First Amendment grounds may tender any rationale in its support may appear odd at first blush, I believe that conclusion is consistent with the mode of resolving such litigation. It must be kept in mind that once the interest is identified, the second and third legs of the test require that the statute actually serve the interest asserted and be narrowly tailored to that end. Thus, if governmental interests are tendered as justification for the statute, but the language of the statute cannot support the contention, or the statute is not narrowly tailored to serve the interest advanced, the rationale must fail and the statute will be struck down. This court must confess that treating governmental interests as legal seems less justified where the First/Fourteenth balancing test is applied. Given the less rigorous standards testing constitutionality in such cases, permitting wholly post hoc rationalizations to justify restrictions of rights may appear to denigrate the character of activities that are central to the maintenance of democratic norms. Of course, as always, given my role as a subordinate court. I

am bound by the decisions of those courts hierarchically superior to this court. Given the analysis above, I am satisfied that the six findings set out in footnote 9 may be tendered in support of Proposition 73 as a matter of law.[12]

With all of the above in mind, I turn to an examination of the plaintiffs' discrete claims.

IV

THE PLAINTIFFS' CONTENTIONS

The original plaintiffs attack the provisions of Proposition 73, asserting that they unconstitutionally burden their rights of association and speech. They also argue that the proposition unconstitutionally favors incumbents over challengers, and unconstitutionally discriminates

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[12] If viewed as a factual matter, there is evidence to support each finding; namely, the language of the Proposition and the arguments found in the voter pamphlet in support of the Proposition. Plaintiffs' Exhibit 15. *See In re Lance W.*, 37 Cal.3d 873, 888 n. 8, 210 Cal.Rptr. 631, 694 P.2d 744 (1985) (ballot pamphlet is accepted source in determining voters' intention); *and see Lungren v. Deukmejian*, 45 Cal.3d 727, 740 n. 14, 248 Cal.Rptr. 115, 755 P.2d 299 (1988). The court has also considered the circumstances of the entire campaign. In the later [sic] regard, the court can and does take judicial notice that at the time Proposition 73 was adopted there was an alternative campaign reform on the ballot, Proposition 68. Although Proposition 73 was pitched as a major counterweight to Proposition 68, but without its public financing feature, the campaigns for both propositions asserted that they were instruments for political reform.

against women and ethnic minorities.[13] They assert that various sections of the proposition either serve no cognizable state interest or that those provisions are unnecessarily broad when construed to serve legitimate interests.

The Democratic Party's suit is pitched somewhat differently. It notes that under Proposition 73, the Party may not contribute more than $5,000 to any candidate in any fiscal year, or accept contributions or more than $2,500 from any one person in any fiscal year for the purpose of making contributions to a particular candidate. Sections 85302 and 85303(b). The Party then notes that section 82015 defines "contribution" as any "expenditure made at the behest of a candidate, committee or elected officer." The phrase "made at the behest of" has been interpreted by the Fair Political Practices Commission (hereinafter sometimes referred to as "the Commission")[14] to mean:

> An expenditure by a political party, broad-based political committee, or political committee made at the behest of a candidate in connection with a communication directed to voters or potential voters as part of voter registration activities or activities encouraging or assisting persons to

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[13] Although the original plaintiffs have been less than clear about their position, as the court understands it, they do not press a separate claim under the Equal Protection Clause of the 14th Amendment; rather, they claim that the effect of the proposition works a deprivation or domination of the First Amendment rights of minorities, women, and challengers. In effect then they launch both a First Amendment and what the court has described above as a First/Fourteenth attack on various of Proposition 73's provisions.

[14] The Commission is the agency charged with civil enforcement of the proposition.

> vote, is a contribution to that candidate only if the communication clearly identifies or expressly advocates the election or defeat of that candidate or a rival candidate for the same elective office.

California Code of Regulations, Title 2, section 182159d).[15]

The Party takes the position that the Commission's present construction of the statute to permit registration efforts and communications at a candidate's behest, provided his name is not mentioned "still limit expenditures for the Party's most effective activities – voter registration and membership communications that mention candidates – to $5,000. Accordingly, the Party remains disabled from effectively performing its unique and crucial role in the political process." Plaintiff-Intervenor's Trial Brief at 8.

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[15] Originally, the Commission adopted a more restrictive interpretation providing that "made at the behest of" included "a payment made under the control or at the direction of, in cooperation, consultation, coordination, or concert with, or at the request or suggestion of a candidate, controlled committee, official committee of a political party, or organization formed or existing primarily for political purposes." That regulation was amended to adopt the present form subsequent to the Democratic Party's intervention in this litigation.

V

MONEY, POLITICS AND THE CONSTITUTION

A. *Fiscal Year Limitations*

The plaintiffs contend that limitations on contributions measured by fiscal year rather than by election, works an unconstitutional preference for incumbents and against challengers. Plaintiffs also contend that the statue unconstitutionally disfavors candidates who determine to enter a particular campaign at a late date.

By virtue of the trial, the court has found that, as a general matter, incumbents have a significant natural advantage over challengers.[16] Moreover, given the way the statute works, an elected official can, and most do, raise substantial amounts of money each of the years of incumbency, while as a general matter challengers cannot, and generally do not, do so.[17]

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[16] Finding of Fact No. 118: "Incumbents running for office generally enjoy a substantial advantage over challengers because they ordinarily have greater resources, name-recognition, access to the media, and a greater ability to raise money. These advantages are generally the result of their being in office and the likelihood that they will remain in power."

[17] Finding of Fact No. 133: "In state races in the off-years 1983, 1985, and 1987, all incumbents, but very few challengers, engaged in fundraising. The average incumbent also substantially outraised the challengers who did raise money in the off-year. In statewide constitutional office races in the off-years 1983 and 1985, incumbents outraised challengers by an average of almost 9 to 1. in State Senate races in the off-years . . . , incumbents outraised challengers by an average of more than 40 to 1. in State Assembly races in the off-years . . . , incumbents outraised challengers by an average of more than 70 to 1."

The situation for challengers is entirely different than for incumbents. First, for a variety of practical reasons, few non-incumbents will decide to run for a particular office years in advance of the election. Even if they do, they will have significant trouble in raising money early in the election cycle.[18] Although challengers need not outspend incumbents in order to win, they must raise significant amounts of money to reach a threshold level of name recognition and candidate viability.[19] Thus, the effect of the fiscal year provisions is to favor the fundraising efforts of incumbents to the disadvantage of those who challenge them for office. Given the fluid character of the events which lead to a candidate challenging an incumbent, and the monetary advantage which incumbents have by virtue of measuring the contribution limitations by fiscal years rather than elections, the plaintiffs urge that a fiscal year limitation is unconstitutional.

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[18] Finding of Fact No. 129: "Challengers raise very little money early in the election cycle. Most challengers do not decide to run until relatively late in the cycle because the prospects for success . . . cannot be assessed years in advance of the election. Even those challengers who decide to run early have trouble raising money because contributors will generally wait to see if the candidate is viable, in particular whether the candidate can even win the primary, before investing in the campaign."

[19] Finding of Fact No. 122: "Because they start at a disadvantage, challengers . . . must raise and spend a considerable amount of money to reach a threshold level of name recognition and image necessary to make the race competitive. Challengers who fail to raise and spend the threshold amount rarely have a chance to win."

In accordance with the method recognized above, I first turn to an examination of the question of whether measuring contribution limitations by a fiscal year constitutes a burden upon First Amendment rights.

It is clear that "contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). Although the plurality in *Buckley* asserted that contribution limits entail "only a marginal restriction upon the contributor's ability to engage in free communication," *id.* at 21, 96 S.Ct. at 635, the High Court has since come to recognize that contribution limits "automatically affect[] expenditures, and limits on expenditures operate as a direct restraint on freedom of expression." *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 299 (1981). Moreover, it appears obvious to this court that contributions made to a common fund for the purpose of forwarding a particular candidacy is a function of rights of association which are protected by the First Amendment. *See FEC v. National Conservative PAC*, 470 U.S. 480, 495 (1985).

Acknowledging that making campaign contributions constitutes activity protected by the First Amendment does not resolve the issue of whether or not the fiscal year provisions at bar burden such activity. It appears to this court that the answer to that question must be "yes." If contributing to political campaigns constitutes activity protected by the First Amendment then, it must follow, that limitations upon such contributions constitute a burden upon First Amendment activity. Because any limitation is composed of two elements – a monetary limit and

a durational limit, I conclude that the fiscal year limitations in and of themselves constitute a burden upon First Amendment activity.[20]

Having determined a limitation based upon a fiscal year measurement does constitute a burden upon free speech, I must now examine the justifications tendered in support of a fiscal year measure. Defendants contend that a fiscal year structure serves the legitimate governmental interest of permitting

> [S]uccessful candidates in the June primary [to] as of July 1 of the same year, receive new contributions from the general election from contributors who gave the candidate the maximum allowable contributions for the primary election. . . . Also, political action committees and political parties who spend contributions given to them for the June primary can, as of July 1, receive additional contributions from the same contributors and use them for the November general election.

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[20] The court recognizes that its holding above is not wholly consistent with a notion expressed by various pluralities of the High Court that contributions to political campaigns constitute only a marginal restriction upon the contributor's ability to engage in free communication" once such contributions may be characterized as speech by proxy. *See Buckley*, 424 U.S. at 20-21, *see also California Medical Ass'n v. FEC*, 453 U.S. 182, 196 (1981). All that this court can say is that as best it can determine, the "speech by proxy" notion has never commanded a majority of the Court, and it appears to be inconsistent with the evolving First Amendment doctrine. Moreover, even if only a "marginal restriction," such limitations are nevertheless restrictions.

Defendants' Trial Brief at 6. The Defendants in Intervention, on the other hand, do not seek to defend the fiscal year measurement per se, but rest their defense of that aspect of the statute upon the undoubted right of the state to regulate contributions in general. *See* Defendants in Intervention's Trial Brief at 11(ff). Thus, as the court understands these defendants' contentions, they are that given the fact that the state has a right to limit contributions in some fashion, measuring by a fiscal year is simply one mode, as legitimate as any other, under which regulation may be accomplished.

It appears to this court that the defendants' contentions have weight only if the statute is subject to review under the Fourteenth Amendment rational classification test. Here, however, as the court understands the position adopted by all parties, some form of heightened scrutiny must be applied by virtue of the fact that fiscal contributions constitute some form of protected speech, or, in any event, implicate equal opportunity to participate in elections. Under such circumstances, whether one employs the stringent standards ordinarily applicable to restrictions upon First Amendment rights, or the balancing test applicable to First/Fourteenth equal opportunity to engage in political activity, the fiscal year provisions of Proposition 73 must fail.

The statute clearly fails the legitimate governmental interest and narrow tailoring test since the fiscal year restrictions, providing as they do a major benefit to incumbents, cannot be sustained upon the rationale that they provide an opportunity for separate contributions to each election. Clearly, a contribution limitation by election, rather than by fiscal year, accomplishes the same

result without providing incumbents with the significant benefit that the fiscal year provisions accord them. For the same reason, a rationale premised on the state's right to regulate campaign contributions is equally unavailing.

Examining the fiscal year limitation under the balancing provisions of the equal participation cases produces the same result. The circuit has explained that in weighing the "precise interests put forward by the State" against "the character and magnitude of the asserted injury," it is necessary to "not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Erum*, 881 F.2d at 692 (*quoting Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). Here, what is at stake is the ability of candidates to compete for contributions on an equal basis as a matter of fact. Because contributions translate into political speech, the favoring of incumbents over challengers constitutes a significant impediment to fair access to the electoral process. Given that the state has a simple and direct way of assuring its asserted governmental goal of permitting contributions to both primary and general elections, but can do so without benefitting incumbents, it seems clear that in any weighing the statute must fail.[21]

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[21] Finally, the court notes that even as a straight Fourteenth Amendment matter, it is uncertain that this statute would pass muster. While it is certainly true, as *Buckley* has suggested, that a court should be hesitant to strike down a statute which is even-handed on its face, *see* 424 U.S. at 31, it is clear in this case from the "record evidence" that the statute works a significant "invidious discrimination against challengers as a class." *Id.*

From all of the above, I conclude that Proposition 73, in measuring the limitation on campaign contributions by fiscal year rather than election, unconstitutionally restricts free speech and favors incumbents against challengers, and must be found to violate the First and Fourteenth Amendments to the United States Constitution.

I must now consider whether I may sever the unconstitutional "fiscal provision" from the rest of the statute.[22] *See Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 506 (1985) (an unconstitutional provision of a state statute may be severed where to do so will not frustrate intent of legislature).[23] I conclude that the fiscal year provisions cannot be severed from the financial limitations themselves and thus, the entire provision must be struck down. It is, of course, true that the court could strike the word "fiscal" from the various provisions of Proposition 73. But to do so would simply put the statute on some annual basis, and the exact vice noted above would be replicated. Indeed, such a revision not only would fail to cure the constitutional problem, it would frustrate the asserted legislative purpose of providing contributors with an opportunity to contribute to both primaries and

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[22] Proposition 73 contains a severance clause. *Calfarm Ins. Co. v. Deukmejian*, 48 Cal.3d 805, 821-22, 258 Cal.Rptr. 161, 771 P.2d 1247 (1989).

[23] California cases provide three criteria for severability: the invalid provision must be mechanically and grammatically severable, it must be functionally severable; and it must be volitionally severable in the sense the statute would have been adopted if the legislative body had foreseen the partial invalidity. *See Calfarm Ins. Co. v. Deukmejian*, 48 Cal.3d 805, 821-22, 258 Cal.Rptr. 161, 771 P.2d 1247 (1989).

general elections. Under such circumstances, severing the word "fiscal" is wholly inappropriate. *Id.* Accordingly, I must find that all the provisions of Proposition 73 relating to limitations on campaign contributions, because they are measured by a fiscal year, violate the Constitution of the United States and are unenforceable.

Given my conclusion that the fiscal year provisions are both unconstitutional and not severable. I need not reach various other contentions made by the plaintiffs. Thus, it is unnecessary for the court to resolve the questions of whether the level of contribution established by the statute coupled with the absence of an escalator clause is unconstitutional. Additionally, since the expenditure limitations relative to unions and political parties are also measured by fiscal years, the court believes it need not reach the separate contentions made by the Union plaintiffs and the Democratic Party.

B. *Transfer Bans*

1. Transfer Among a Candidate's Own Committees

On May 19, 1989, this court issued a preliminary injunction, finding the ban on transfers among a candidate's own committee burdens First Amendment rights and serves no compelling state interest sufficient to justify those burdens. The court believes that the injunction should be made permanent. It is clear that the ban acts as an expenditure limitation; such limitations have never been upheld, save in connection with the expenditures of corporations. Moreover, the sole justification offered for

the inter-committee transfer ban, is a notion that contributions given for one office ought not be diverted to another, because the donation was solicited and given with a particular office in mind. This "trust" theory, which suggests donations are premised upon the office rather than the candidate, may, of course, sometimes be true; on the other hand, as evidence in this trial demonstrated, it is sometimes false.[24] More to the point, it is clear that to the extent the provision is intended to insure truth in soliciting, a narrower and more efficacious means is readily at hand. Such a purpose is easily served by requiring that the candidate inform potential donors of his intentions, or if he is unable to do so, to acknowledge that the sums raised could be expended on other races. For these reasons, and essentially for the reasons argued by plaintiffs in their points and authorities in support of preliminary injunctive relief, the court enjoins the enforcement of those provisions of Proposition 73 prohibiting transfers between the various committees of the same candidate.

2. Inter-Candidate Transfers

Plaintiffs also attack those provisions of Proposition 73 which ban all transfers between candidates.[25] They

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[24] Finding of Fact No. 102: "Plaintiff Allen Ruby contributes to candidates to use funds for whatever office the candidate wishes to pursue. He wishes to support the political ideas of each candidate, not necessarily their race for a particular office."

[25] It appears to the court that these provisions are not resolved by the court's fiscal year determination above, since

(Continued on following page)

argue that once a contribution is received by a candidate, his decision to contribute to another candidate should be viewed as an expenditure rather than a contribution, and that the ban works a particular hardship on minority candidates.

The evidence before the court has demonstrated that contributing to other candidates is a recognized means of seeking and maintaining leadership positions in California's legislative bodies.[26] In that sense, it may be said that at least for members of the legislature seeking leadership positions, transfers can be viewed as expenditures for office. Even if so viewed, however, it is not clear to this court that such expenditures should enjoy the special solicitude accorded expenditures under *Buckley*. That special solicitude grew out of the Supreme Court's recognition that expenditures constitute direct political speech, an activity at the core of First Amendment protection. Here, even if the transfer is for the purpose of forwarding

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unlike the political party or political committee limitations which are premised on fiscal years, the provisions in question are absolute bans.

[26] Finding of Fact No. 91: "Among other reasons candidates transfer campaign funds to other candidates in aid of the transferor's goal of attaining a leadership position in the legislature."

Finding of Fact No. 92: "While transfers render fundraising ability an important criterion in the selection of legislative leaders, the leadership office is itself a significant aid in fundraising."

Finding of Fact No. 93: "Fundraising for other legislators is a traditional leadership duty."

the transferor's ambition for legislative leadership, it is not transmuted into political speech until expended by the transferee. Under this analysis, it appears to the court that transfers from candidates ought to enjoy a status and protection no different than that accorded donations in general.[27]

The record also demonstrates that, in general, minority candidates, and particularly minority challengers, have greater difficulty raising funds than white male candidates.[28] Moreover, the record demonstrates that because incumbents have, as a general matter, a greater ability to raise money than challengers,[29] a process has developed under which incumbents raise money for

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[27] As I explained in footnote 20, *supra*, the notion that contributions are less worthy of protection because they do not constitute speech has not commanded a clear majority of the Court. My observations above, although they appear to adopt a speech by proxy argument, seek to make a different point. It appears to this court that contributions made by legislators for the purpose of furthering the goal of attaining or maintaining a legislative leadership position, are for First Amendment purposes, of a different order than all other contributions. In the former case, the purpose of the donation does not bear on political discourse at all, and it only achieves the character of political speech when made available to the candidate.

[28] Finding of Fact No. 146: "Minority challengers have difficulty raising funds for election campaigns because of negative stereotypes, and because minority supporters are often economically underprivileged."

[29] *See* Finding of Fact No. 118 at footnote 16, *supra*. Finding of Fact No. 127: "In general, incumbents can raise money from a wider variety of sources than challengers. . . . "

challengers in truly competitive elections.[30] This process is specially important to minority challengers since they must raise sufficient funds early enough[31] to reach the required threshold so that they may be seen as a viable candidate worthy of contributions on their own.[32]

Notwithstanding the fact that as a practical matter partisan transfers have had a beneficial effect upon the race of at least some minority candidates[33], plaintiffs cannot sustain their burden of demonstrating that the prohibition on candidate transfers works an unconstitutional burden on minority candidates. On the other hand, given my ruling on the fiscal year provisions, the ban on contributions cannot be sustained on the grounds advanced by the defendants, and it too must be declared unenforceable. I turn first to plaintiffs' First/Fourteenth claim.

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[30] Finding of Fact No. 138: "Political science literature defines 'competitive races' as those where the winner received 55% of the vote or less. This is a reasonable definition."

[31] Finding of Fact No. 144: "Transfers from established officeholders are often necessary to help a minority challenger begin a campaign."

[32] *See* Finding of Fact No. 122 at footnote 19, *supra*. Finding of Fact No. 135: "Money raised early in an election cycle is generally worth more to the candidate than money raised later on because the early money can become seed money used to raise more money."

[33] Finding of Fact No. 145: "Willard Murray, the first black assemblyman to win election in his majority white district, received large amounts in transfers from other candidates to help his campaign."

As I noted above, it is clear that minority challengers face problems in raising funds which are not shared by others. Those problems, however, are not the product of legal restrictions upon their right to raise funds, nor do the provisions at bar, like the fiscal year provisions, by their nature, favor incumbents, white male or otherwise. Rather, the problems faced by such candidates grow out of the perceptions of potential contributors and the socio-economic reality of minority populations in California; issues which plaintiffs' constitutional challenge do not address. Put another way as I now explain, because the statutes are essentially irrelevant to the problem faced by minority candidates as a class, striking them down will have no effect upon the realities of California campaign financing. For this reason, plaintiffs cannot sustain their attack on the statute premised on an assertion that the statutes discriminated against minority candidates as a class.

I begin by observing that while it is true that the present legislative leadership has contributed to some minority challengers, it is equally true that transfers have been used to support incumbents.[34] For the same reason, if the court were to declare the transfer ban unconstitutional on the ground that it adversely affected minority candidates, there is no reason to believe that minority candidates as a class would benefit. The basis for this

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[34] Finding of Fact No. 106: "In the three general election years immediately preceding the effective date of Proposition 73, incumbents in contested California legislative races received more money in transfers from other candidates than their challengers in 106 out of 146 races in which such transfers were made."

conclusion seems obvious; decisions by candidates to transfer funds, like the decision of any contributor, are made on the basis of a series of subjective judgments focusing on the candidate's potential for success or a desire to associate with a candidate's political position regardless of the candidate's likelihood of success. Since eliminating the ban of transfers would have no effect upon the reasons that minority candidates as a class do or do not receive contributions, it will have no appreciable effect upon minority candidates, as a class, receiving or not receiving donations. Put another way, while the absence of a transfer ban would permit transfers to minority candidates, it would not compel them, and there is simply no basis to suggest that minority candidates as a class, as contrasted with individual candidates, would benefit. Such a conclusion completely undermines an attack on the statute which is premised on the asserted class bias of the provision.

The attack on the complete ban of transfers premised on pure First Amendment grounds, however, would appear to fair much better. As I noted above, there is no dispute that political contributions are some form of protected speech,[35] though there is dispute as to the level of protection they enjoy. Accordingly, plaintiffs have satisfied the first step in the analytical process and the burden now shifts to defendants to demonstrate that the transfers serve some legitimate governmental interest.

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[35] Whatever motive may cause certain legislative leaders or aspirants to legislative leadership to contribute to some candidates, the ban is not limited to such a class, assuming that such a class could be identified.

Both the defendants and the defendants-in-intervention argue that the provision is a necessary corollary to those provisions setting contribution limitations. They note that under *Buckley*, provisions which seek to limit opportunities to do indirectly that which is prohibited directly, have been upheld. *See California Medical Ass'n v. FEC*, 453 U.S. 182, 198 (1981). They maintain that the transfer ban is simply a device to prevent those who desire to avoid the contribution limits from doing so by the simple expedient of using another candidate as a conduit for the contribution.

Defendants' argument would have significant weight if Proposition 73's campaign limitations were in effect. Given the determination above that limitations premised on a fiscal year cannot withstand constitutional scrutiny, the ban, to the extent it is premised on the need to prevent subversion of fiscal year limitations, must also fail.[36]

Neither defendant has made the argument that the provisions in question are also justified on the basis of avoiding fraud on contributors who intended to donate to a certain candidate's campaign but not to the transferee's. It appears to this court that such an argument, if made, must fail for two reasons. First contributions are fungible, and thus there is no way to trace particular transfers to particular contributors; second, any such justification would fail the narrowly tailored prong of the first

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[36] The court expresses no opinion upon the relationship of the transfer ban to any campaign limitations arising out of other provisions of California law, including Proposition 68.

Amendment test for the same reasons the candidate committees ban failed.

V

ORDER

For all of the above reasons, relative to those provisions of the California Government Code adopted as Proposition 73, THE COURT ORDERS AS FOLLOWS:

1. All contribution limitations measured on a fiscal year basis violate the provisions of the First Amendment to the Constitution of the United States and are hereby declared unenforceable; accordingly, enforcement of all such provisions are PERMANENTLY RESTRAINED;

2. All provisions prohibiting candidates from transferring contributions among or between the candidate's own committees violate the provisions of the First Amendment to the Constitution of the United States and are hereby declared unenforceable, accordingly, enforcement of all such provisions are PERMANENTLY RESTRAINED;

3. All provisions prohibiting candidates or elected officials from asking contributions to other candidates from their own campaign funds insofar as they are premised upon the need to prevent evasion of campaign contribution limitations based on fiscal years violate the provisions of the First Amendment to the Constitution of the United States and are hereby declared unenforceable; accordingly, enforcement of all such provisions are PERMANENTLY RESTRAINED;

Let judgment enter accordingly,

IT IS SO ORDERED.

SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC; et al., Plaintiffs,

California Democratic Party, an unincorporated association, Plaintiff in Intervention,

v.

FAIR POLITICAL PRACTICES COMMISSION, et al., Defendants,

Quentin L. Kopp and Ross Johnson, Defendants in Intervention.

No. CIV. S-89-433 LKK.

United States District Court, E.D. California.

Sept. 14, 1989.

721 F.Supp. 1172

Joseph Remcho, Kathleen J. Purcell, Lowell Finley; Julie M. Randolph, Steven D. Dopkin, Remcho, Johansen & Purcell, San Francisco, Cal., for plaintiffs.

Robert E. Darby, Calvin House, Fulbright, Jaworski, Reavis & McGrath, Los Angeles, Cal., for plaintiff in intervention.

Kathryn E. Donovan, Scott Hallabrin, Fair Political Practices Comm'n, Sacramento, Cal., for defendants.

Quentin L. Kopp, Kopp & DiFranco, San Francisco, Cal., for defendants in intervention.

ORDER

KARLTON, Chief Judge.

In this action, plaintiffs brought suit against the California Fair Political Practices Commission ("FPPC")[1] challenging as unconstitutional a statute adopted pursuant to California's initiative process, Proposition 73, codified as Title 9, Chapter 5 of the California Government Code.[2] Proposition 73 seeks to control campaign financing in various ways. The motion at bar seeks summary judgment only with regard to California Government Code section 85306,[3] which concerns the use of campaign funds raised prior to January 1989.[4]

Plaintiffs filed their complaint for declaratory and injunctive relief on March 24, 1989. A motion for preliminary injunction was granted on May 15, 1989. That order

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[1] Under state law, the FPPC is the agency charged with the responsibility of enforcing civil statutes pertaining to the financing of elections. Cal.Gov.Code § 83111.

[2] Subsequently, I granted the motions of State Senator Kopp and Assemblyman Johnson, self-described principal authors of Proposition 73, to intervene as parties defendant, and the California Democratic Party to intervene as a plaintiff.

[3] The statute provides: "Any person who possesses campaign funds on the effective date of this chapter may expend those funds for any lawful purpose other than to support or oppose a candidacy for elective office."

[4] Defendants in intervention have filed a motion to strike certain evidence. The motion is denied since it was not filed in conformance with the briefing schedule established for the motion at bar. *See* Local Rule 110. In any event, extended consideration of the motion is unnecessary since none of the evidence defendant-intervenors seek to strike is crucial to the court's analysis.

enjoined the FPPC from applying section 85306 to pre-1989 funds raised within Proposition 73's overall contribution limits.[5] At a subsequent status conference in which a hearing on the instant motion was set, the parties stipulated that in the event this motion is granted, pre-1989 funds could be disbursed and accepted without regard to fiscal year deadlines.

I

SUMMARY JUDGMENT STANDARDS UNDER FED.R.CIV.P. 56

Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). Under summary judgment practice, the moving party

> [A]lways bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

If the moving party identifies an absence of material fact in the record, the burden then shifts to the opposing

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[5] As a general matter, Proposition 73 limits fiscal year contributions to candidates as follows: $1,000 per individual (§ 85301(a)); $2,500 per political committee (§ 85303(a)); and $5,000 per political party, or broad-based political committee (§ 85303(b)).

party to establish that a genuine issue as to any material fact actually does exist. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In attempting to establish the existence of this factual dispute, the opposing party is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. Rule 56(e); *Matsushita*, 475 U.S. at 586 n. 11. The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the evidence could support a verdict for the nonmoving party, *Anderson*, 477 U.S. at 248-49; *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1436 (9th Cir. 1987).

In resolving the summary judgment motion, the court examines the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. Rule 56(c); *SEC v. Seaboard Corp.*, 677 F.2d 1301, 1305-06 (9th Cir. 1982). The evidence of the opposing party is to be believed, *Anderson*, 477 U.S. at 255, and all reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party, *Matsushita*, 475 U.S. at 587, (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam)); *Abramson v. University of Hawaii*, 594 F.2d 202, 208 (9th Cir. 1979).

Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn.

Richards v. Nielsen Freight Lines, 602 F.Supp. 1224, 1244-45 (E.D.Cal.1985), *aff'd*, 810 F.2d 898, 902 (9th Cir. 1987). To demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Matsushita*, 475 U.S. at 587 (citation omitted).

II

FACTS

Plaintiffs, relying upon the FPPC's records, note that incumbent state legislators and constitutional officers had $12,403,312 in campaign funds on hand as of December 31, 1988. Defendant-intervenors, while supplying no contradictory evidence, assert that:

> Defendant-Intervenors believe that the amount of campaign funds affected by section 85306 is a genuine issue of material fact. Reference Declarations of Ross Johnson and Quentin L. Kopp and Supplemental Declaration of Ross Johnson declaring that Section 85306 does not restrict his First Amendment rights of free speech.

Amended Response by Defendant-Intervenors to Plaintiff's Statement of Undisputed Facts, filed July 28, 1989, at 2.

These referenced declarations do not contradict the facts asserted by plaintiffs, nor is there a challenge to the reliability of the relevant records. Rather, in their Amended Response, defendant-intervenors dispute that funds are not available "for campaign purposes" (at best

a legal issue, at worst a semantic dispute); the effect of section 85306 on individual plaintiffs (e.g., "the precise affects [sic] of section 85306 on the financing of the Friends of David Roberti is a genuine issue of material fact"), and like matters which do not appear to this court to constitute *material* issues of fact. *See* Section I (material issue of fact is one which affects the disposition of the motion).

Thus the Declaration of Ross Johnson, to which the objection refers, avers:

> I have been able to meet with my constituency and conduct the duties of my leadership position without any inhibition whatsoever on my ability to communicate my political views and agenda.
>
> The statutory structure which is alleged to "impermissibly restrict[]" Plaintiffs' (and the rest of us privileged enough to represent our constituents [sic]) constitutional freedoms does not do so. In drafting Proposition 73, it was my goal to ensure California's elected officials would not sacrifice their guarantees under the First and Fourteenth Amendments. I believe I met that goal, and on June 7, 1988 the People of California agreed.

Johnson Declaration at 5. This declaration simply does not create any issue of material fact. Assemblyman Johnson's subjective judgment concerning the effect of section 85306 on his ability to communicate with his constituents, and his intentions concerning the effect of Proposition 73, do not raise disputes as to its objective effect on the ability of either himself or others to expend the carryover funds on behalf of their own political campaigns. As I

shall explain below, the central relevant fact at bar is that by virtue of the provisions of section 85306, a large sum of money raised prior to the effective date of the statute may not be expended on behalf of a candidate's pursuit of state elective office. This fact is not in genuine dispute.

III

POLITICAL CAMPAIGNS AND THE FIRST AMENDMENT

By its plain terms, section 85306 permits the use of campaign funds raised prior to the effective date of the statute for any lawful purpose except that for which it was given; namely, the direct advancement of the donee's political career. *See* footnote 3. Plaintiffs contend that the statute, in precluding expenditure of carryover funds to support or oppose a candidacy for state elective office, violates the free speech provisions of the First Amendment of the United States Constitution which, of course, were made applicable to the states through the Fourteenth Amendment. *See, e.g., Fiske v. Kansas*, 274 U.S. 380 (1927).

To sustain their attack, plaintiffs must first demonstrate that the provisions in issue impinge upon rights protected by the First Amendment. This task is easily accomplished. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court taught that the expenditure of funds in connection with a political campaign is a matter of particular First Amendment concern. Critical to the issue at bar was the Court's determination that, in essence, every dollar spent in a campaign has value as protected speech

and, accordingly, every restriction on expenditures implicates First Amendment rights. The Court explained:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communication ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

424 U.S. at 19. *See also California Medical Ass'n v. Federal Election Commission*, 641 F.2d 619, 627 (9th Cir. 1980), *aff'd* 453 U.S. 182 (1981) ("the ideal of the First Amendment, certainly in respect to political expression, is to permit the maximum 'quality of political speech,' as determined by the speaker"). Defendants seem to argue that given the broad discretion to expend carryover funds provided by the statute, it should not be regarded as an expenditure limitation at all and, accordingly, should not be perceived as implicating First Amendment rights. The argument must be rejected.

All parties apparently agree that the definition of "lawful purposes" for which pre-1989 funds could be expended is extremely broad. Such funds can be

expended, among other things, to support or oppose ballot measures or candidates for federal office, to pay pre-1989 campaign expenses, to disseminate political views as long as unconnected with a campaign for state elective office or, for that matter, to contribute to charity.[6] Upon careful consideration, however, the broad scope of available targets for expenditure is irrelevant to the threshold First Amendment issue.

Defendants' argument amounts to no more than an attempt to deny that restrictions on political expenditures are restrictions on political speech. This attempted reliance on semantic legerdemain will not lie. It is, of course, true that many lawful expenditures might indirectly aid a candidate's campaign; that is simply beside the point. The statute constitutes a direct restraint on the content of the candidate's speech. It permits speech on behalf of a measure to undo Proposition 73, but not in support of the candidate's election. The argument that there is no restriction on speech because the candidate can support his campaign with other funds also misses the mark. It is the essence of *Buckley* that each dollar has First Amendment value. That the expenditure limitation directly implicates the core values of the First Amendment seems beyond dispute. *California Medical Ass'n v. FEC, supra.*

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[6] "Any lawful purpose," as defined by Cal.Admin.Code tit. 2, § 18536.2(a), is circumscribed by the "personal use" laws of California Elections Code § 12401. These laws forbid the use of funds for "a substantial personal benefit" which "does not have more than a negligible political, legislative, or governmental purpose."

Having concluded that the right of candidates to expend carryover funds in campaigns for elective office is "entitled to full First Amendment protection, we now look to see if there is a sufficiently strong governmental interest served by [the statute's] restriction on them and whether the section is narrowly tailored to the evil which may be legitimately regulated." *FEC v. National Conservative PAC*, 470 U.S. 480, 496 (1985), (hereinafter "*PAC*").

The first step, identification of a strong governmental interest, presents a serious impediment to the proponents of section 85306. The gist of their argument is that Proposition 73 was passed as an overall attempt at campaign reform, and that section 85306 compliments the provisions concerning contribution limits which reflect the proposition's central purpose. Put another way, the defendants contend that the governmental interest which section 85306 seeks to address is to "level the playing field" on which candidates enter campaigns under Proposition 73's contribution limits. Defendant-intervenors cannot successfully maintain this argument. In *Buckley*, the Court specifically rejected it:

> It is argued . . . that the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation on express advocacy of the election or defeat of candidates imposed by [the] expenditure ceiling. But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information

> from diverse and antagonistic sources,' " and " 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' "

424 U.S. at 48-49 (citations omitted).

Defendants seek to avoid the plain consequences of *Buckley* by equating the interests sought to be served by section 85306 with the interest served by contribution limits. They argue that section 85306 cannot be viewed in isolation, but that the court must examine the statute's purpose as a whole. Defendants seem to suggest that since the contribution limits provisions address the evil of corruption or the appearance of corruption, engendered by large contributions, and since in some manner section 85306 effectuates these limitations, it likewise serves to limit corruption or the appearance thereof.

Defendants' argument is unpersuasive; it obscures both the nature of the speech addressed by the statute in issue and the character of the regulation of that speech imposed by the statute. In sum, the defendants ask the court to apply an ax where only a scalpel will do. As the Supreme Court has frequently admonished, " 'precision of regulation must be the touchstone' in the First Amendment context." *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 303 n. 11 (1986), *quoting NAACP v. Button*, 371 U.S. 415, 438 (1963). *Buckley* taught that a close examination of both the particular speech regulated and the manner of regulation is required; it held on the basis of such an examination that a candidate's expenditure has a different character than a contributor's act of donating and, applying an identical "strict scrutiny" test to expenditures and contributions, concluded that different results

obtained.[7] As with the expenditure limitations at issue in *Buckley*, section 85306 directly affects a candidate's "quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Buckley*, 424 U.S. at 19. Money which, but for the ban, could be used on pamphlets and advertising, for example, cannot be so used, and dissemination of the political message is accordingly curtailed.

In short, section 85306 bans the expenditure of money directly on a campaign. Campaign expenditure by the candidate has discrete First Amendment characteristics. *California Medical Ass'n*, 641 F.2d at 627 (spending is entitled to the maximum protection when the speaker and the spender are one and the same). Ignoring those characteristics by failing to discretely analyze section 85306, and instead merging its consideration into an analysis of the general purpose of Proposition 73, contradicts both general First Amendment doctrine and the holding of *Buckley*. Section 85306 regulates a different form of speech than the contribution limits and must be analyzed

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[7] *Buckley* effectively found that a contribution limitation scheme could pass constitutional muster because limiting the amount of a contribution does not infringe on the "speech" interest inherent in giving. The contribution limitations of Proposition 73 are not now before the court. Nonetheless, defendants do not contend that Proposition 73's contribution limitations provide any greater justification for an expenditure limitation than the contribution limitations considered in *Buckley* provided the expenditure limitation considered and rejected there.

separately. To justify the prohibition of expenditures commanded by section 85306, the defendants must demonstrate a "compelling state interest" justifying that section, as distinct from the interest potentially justifying contribution limits.

I will assume *arguendo* that section 85306 seeks to address the problem of political corruption or the appearance of corruption.[8] The question then is whether section 85306 in fact addresses those evils and, if so, whether it is narrowly tailored to that purpose. To answer those questions it is crucial to define those evils.

The High Court has explained that "corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaign." *PAC*, 470 U.S. at 497. Given this definition, it appears that the ban on expenditure of carryover funds does not address the issue of corruption at all. Under the teaching of *PAC*, the corrupting influence of large contributions results from their receipt and the hope of future receipts. "The hallmark of corruption is the financial quid pro quo: dollars for financial favors." *Id.* Yet a ban on only certain expenditures

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[8] Although other arguments in favor of Proposition 73 were offered to voters, the anti-corruption in fact and appearance rationale is the only one sanctioned by the Supreme Court, *PAC*, 470 U.S. at 496-97, and the only one advanced by the FPPC. Defendant-intervenors argue that preserving the integrity of the electoral process is a separately sanctioned rationale, citing *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 788-89 (1978). This appears to be yet another semantic distinction without a difference in substance.

does not address the obligation arising from receipt; a debt owed is a debt owed, no matter the purpose for which the money may be spent. There is simply no link between the elimination of corruption and the ban on expenditures of money already received.

Moreover, to the extent that the "lawful purpose" regulations (see footnote 6) allow funds to be used indirectly for campaigning, the carryover ban again fails to address the problem of corruption as defined by the High Court. Under the regulations, funds may be used to pay off past campaign debts, for example, or to sponsor a ballot initiative related to a candidate's platform. If the obligations engendered by receipt and expenditure of large contributions is thought to be the evil to be controlled, no principled distinction can be drawn between direct and indirect expenditures. For the very same reason, section 85306 is not narrowly tailored to restrict the evil to be controlled.

Other reasons convince this court that section 85306 is overbroad. The statute overshoots its mark by banning expenditures of all money on hand, whether it was obtained in large or small amounts. If the essence of corruption is the quid pro quo, the amount tendered must be sufficient to give rise to an obligation. Here, the statute prohibits the expenditure of sums received by the candidate which were small enough so that they neither could corrupt or even give the appearance of corruption.

If, as Proposition 73 determines, individual contributions up to one thousand dollars do not pose a threat of corruption or the appearance of corruption, *see* footnote 3, then section 85306, which forbids the expenditure of

funds on hand no matter how small the individual contributions making up that amount were, is not narrowly tailored to address the evil which may be regulated.

Defendant FPPC asks the court to avoid the latter conclusion by accepting its regulations limiting section 85306 to contributions exceeding Proposition 73's guidelines. These regulations do not cure the infirmity created by the "lawful purposes" clause considered above. Moreover, I do not believe I would be free to do so in any event. A state court of general trial jurisdiction has invalidated these regulations as beyond the FPPC's powers. *California Common Cause v. Fair Political Practices Commission*, Los Angeles County Superior Court No. C709383. That determination appears inevitable under state law. Under California law, "[a]dministrative regulations that alter or amend the statute or enlarge or impair its scope are void." *Morris v. Williams*, 67 Cal.2d 733, 63 Cal. Rptr. 689, 433 P.2d 697 (1967). Section 85306 clearly bans all carryover funds, and the attempt to limit this effect would appear to be an usurpation of the legislative function. The FPPC's contention is premised on the well-known canon of statutory construction that courts should construe statutes where they may fairly do so to avoid decisions as to their constitutionality. *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568 (1988). This contention is unavailing. As I have previously explained, "canons of construction extrinsic to the text" may not "be employed to create an ambiguity which is not inherent in the language" of the statute. *See Catholic Social Services v. Meese*, 664 F.Supp. 1378, 1382 (E.D.Cal.1987). As the Supreme Court has just reiterated, "interpretative canon[s] [are]

not a license for the judiciary to rewrite language enacted by the legislature." *United States v. Monsanto*, ___ U.S. ___, ___, 109 S.Ct. 2657, 2664, 105 L.Ed.2d 512 (1989), *quoting United States v. Albertini*, 472 U.S. 675, 680 (1985). The FPPC's regulations cannot be given weight since the statute plainly intended to prohibit the expenditure of all carryover funds. *See PAC*, 470 U.S. at 499.

Defendants also seek to justify the ban on expenditure of carryover funds by arguing that section 85306 assures the voters that all potentially corrupting contributions have been purged from the electoral process. On analysis, this is an argument that although the statute may not address the fact of corruption, it addresses its appearance. The boundaries of the notion of the appearance of corruption have not been fully developed. It is clear, however, that in order to insure that the First Amendment rights at stake here are given the breathing room they require, *New York Times v. Sullivan*, 376 U.S. 254 (1964), the scope of that evil must be narrowly defined. As the Supreme Court has taught, there must be real substance to the fear of corruption; mere suspicion, that is "a tendency to demonstrate distrust . . . is not sufficient," no matter how widely the suspicion is shared. *PAC*, 470 U.S. at 499. The vague notion of purging past obligations would not appear sufficiently precise to justify the wholesale restriction on political speech mandated by the statute. Moreover, even if the statute serves to avoid the appearance of corruption, because of the "lawful purposes" exception, it "does not provide an answer that sufficiently relates to the elimination of those dangers." *Buckley*, 424 U.S. at 45.

Defendant FPPC also argues that to the extent section 85306 applies to independent expenditures, it can be construed as a contribution limit. So construed, section 85306 would prohibit political action committees from contributing pre-1989 funds to candidates, but would not prohibit them from spending such funds on a candidate's behalf. This construction is untenable; it contradicts the plain meaning of the statute as well as FPPC's own Regulation No. 18536.2(b). When a statute's purpose is plain, it is for the legislature, not the court, to alter it. *See Laborers' Health & Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Company, Inc.*, 484 U.S. 539 (1988). The ban on carryover funds as it applies to independent expenditures by political action committees is clearly unconstitutional. *Buckley*, 424 U.S. 1; *Federal Election Commission v. Mass. Citizens for Life*, 479 U.S. 238 (1986); *PAC*, 470 U.S. 480.

Finally, defendant-intervenors argue that section 85306 serves the compelling state interest of providing equal opportunities to challengers and incumbents. This argument, made here under the aegis of the equal protection clause, in effect merely recharacterizes the "level playing field" argument rejected in *Buckley*. In light of *Buckley*, the defendants' argument cannot be entertained.

IV

INJUNCTIVE RELIEF

The relief sought by the plaintiffs takes the form of a permanent injunction prohibiting enforcement of section 85306. I have recently had occasion to examine the implications of the doctrine that not all violations of law

automatically justify the awarding of injunctive relief. *See Wilderness Society v. Tyrrel*, 701 F.Supp. 1473 (E.D.Cal.1988). As I explained there, however, the consequences of that doctrine are very modest. Since considerations of public policy must weigh in determining the propriety of equitable relief, *id.* at 1479, and the Constitution is the ultimate expression of the policy of the United States, only the strangest of circumstances would suggest that a violation of the Constitution would not be subject to equitable relief. No such circumstances present themselves here.

Moreover, it is apparent that the application of conventional injunction doctrine demands the granting of the relief plaintiffs seek in this case. "The [Supreme] Court has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). The Court has taught that the abridgment of First Amendment freedoms constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976); *see also San Diego Committee v. Governing Bd.*, 790 F.2d 1471, 1473 n. 3 (9th Cir.1986). Because the constitutional violations demonstrated by plaintiffs are, by their nature, irreparable, and no adequate legal redress can compensate for the loss of political expression, plaintiffs are entitled to a permanent injunction.[9]

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[9] I have repeatedly examined the Ninth Circuit's variously expressed standards for the granting of injunctive relief. *See e.g., Wilderness Society*, 701 F.Supp. at 1476-77. Given the plain propriety of granting injunctive relief once a violation of the First Amendment has been found under the circumstances of this case, no purpose would be served by rearticulating and applying those standards to the matter at bar.

In accordance with the above, IT IS HEREBY ORDERED that plaintiffs' motion for partial summary judgment is GRANTED. California Government Code section 85306 violates the First Amendment of the United States Constitution, and its enforcement is enjoined.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC; et al.,

Plaintiffs,

v.

FAIR POLITICAL PRACTICES COMMISSION, et al.,

Defendants.

_____/

CALIFORNIA DEMOCRATIC PARTY,

Plaintiff-Intervenor,

and

QUENTIN L. KOPP and ROSS JOHNSON,

Defendants-Intervenors.

_____/

NO. CIV. S-89-433 LKK

FINDINGS OF FACT (As Amended)

(Filed Sep. 25, 1990)

The court herewith makes its findings of fact in the above-captioned action. The court has attempted to address each request for a finding made by any party. The court, however, has declined to include here certain conclusions about the law which have been proposed by various parties.

I. PARTIES

1. Plaintiff Service Employees International Union, AFL-CIO (hereafter "SEIU"), is a labor union of approximately 240,000 members that represents workers in the service trades, many of which are in low wage industries.

2. Plaintiff California State Council of Service Employees/COPE (hereafter "SEIU/COPE") is a political action committee formed in compliance with the California Political Reform Act (Cal. Gov't Code, §§ 81000, *et seq.*). SEIU/COPE receives payments from members of plaintiff SEIU of approximately $1.50 per member for the purpose of making political contributions, and has in the past used those contributions to make monetary and in-kind campaign contributions to candidates for elected office in California. SEIU/COPE wishes to continue to make such contributions.

3. Plaintiff California Teachers Association (hereafter "CTA") is a labor union of over 170,000 members representing teachers and other employees in California's public schools. CTA has in the past endorsed and wishes to continue to endorse candidates for elected office in California and to communicate endorsements and other political messages to its members. Members of CTA, through the political action committee California Teachers Association/Association for Better Citizenship (hereafter "CTA/ABC"), have made monetary and in-kind contributions to candidates for elected office in California.

4. The California Teachers Association is not a minority-oriented organization.

5. Plaintiff California Federation of Teachers (hereafter "CFT") is a labor union with approximately 30,000 members. CFT has in the past endorsed candidates for elected office in California, and has made contributions to such candidates.

6. Plaintiff California Federation of Teachers/ Council on Political Education (hereafter "CFT/COPE") is a political action committee that contributes to candidates for elected office in California.

7. Plaintiff Willie L. Brown, Jr. is the Speaker of the Assembly of the State of California. Plaintiff Brown receives and spends campaign contributions through campaign committees, including plaintiff Willie Brown Campaign Committee, and wishes to be able to contribute these funds to other candidates, to transfer them to other campaign committees under his control, and wishes to be able to contribute to candidate-controlled ballot measure committees.

8. Plaintiff Friends of David Roberti is a campaign committee formed to support and is controlled by California State Senator David Roberti. The committee holds in a candidate account campaign contributions given for the support of Senator David Roberti, and wishes to contribute those funds to other candidates, to other candidate committees controlled by David Roberti and to candidate-controlled ballot measure committees.

9. Plaintiff Committee to Protect the Political Rights of Minorities is a political action committee originally formed to oppose Propositions 68 and 73. Among its present objectives is the increase in the number of minority representatives in California government.

10. Plaintiff Allen Ruby is an individual who has contributed to candidates for elected office in California. Plaintiff Ruby wishes to continue making such contributions in the future without the limits imposed by Proposition 73.

11. Defendant Fair Political Practices Commission ("FPPC") is the state agency charged with the responsibility of enforcing the Political Reform Act civilly. (Cal. Gov't Code § 83111.)

12. Defendants John Larson, Donald Vial, Francisco Aparicio, George Fenimore, and Joseph A. Rattigan, are each members of the Fair Political Practices Commission. Defendants Larson, Vial, Aparicio, Fenimore and Rattigan, each acting in his official capacity and under color of state law, have acted to enforce the provisions of Proposition 73 challenged in this action.

13. Defendant-intervenor Quentin Kopp is a member of the Senate of the State of California, and an author of Proposition 73.

14. Defendant-intervenor Ross Johnson is the Republican Leader of the Assembly of the State of California, and an author of Proposition 73.

II. THE DEMOCRATIC PARTY IN CALIFORNIA

15. The California Democratic Party is a political party. The goals of the California Democratic Party (sometimes hereinafter referred to as "the Party") are to enroll new members, recruit candidates and assist in their election by communicating with its members, and by

mobilizing the electorate sympathetic to the Party or its candidates.

16. The term "voter mobilization," as used by the Party, refers to an integrated process of registration, communication and get-out-the-vote activities on the part of the Party.

17. The California Democratic Party is composed of a very diverse group of individuals, caucuses and committees, whose decisions are not readily controlled by any single interest group or individual contributor.

18. Officeholders and candidates serve on the California Democratic Party's governing bodies, i.e., the State Central Committee, the Executive Board, the County and Assembly District Committees, and often are consulted before decisions are made on how to spend money on the Party activities.

19. The program and budget of the Party are developed and approved by its Executive Board, which consists of approximately 280 members.

20. The members of the Executive Board of the California Democratic Party include one representative from each of the 80 state assembly districts, representatives from county Democratic committees, the chairs of each of the eleven caucuses of the Party, members of the Democratic National Committee, chairs of standing committees of the Party, and Democratic public officials and state officers.

21. Contributors to the California Democratic Party have no direct control over how their contributions are spent by the Party.

22. There are no large contributors to the Party on the Executive Board or the Finance Committee of the Party.

23. Although the Party chair and executive staff have some discretion in conducting Party affairs and making decisions concerning expenditures between Executive Board meetings, they are accountable to the Executive Board for their actions.

24. The diverse constituencies of the California Democratic Party and its organizational character make it very difficult and thus unlikely that a large contributor could use the Party as a "conduit" and thereby avoid the limits on direct contributions to candidates contained in Proposition 73.

25. Labor unions are traditional sources of funding for the Democratic Party's absentee ballot and get-out-the-vote activity.

26. Much of the money contributed by labor unions to the California Democratic Party derives from small weekly or monthly contributions from members, which are aggregated by unions or their PACs.

27. Plaintiff SEIU/COPE contributes to the California Democratic Party to aid the carrying out of the Party's mission. It does so because it believes such contributions advance the goals of the SEIU.

28. Absent the contribution limits of Proposition 73, there are many labor unions, both in California and in other parts of the country, that would be willing to give the Party contributions in excess of $2,500 for use in candidate-specific get-out-the-vote efforts.

29. There are contributors to the California Democratic Party who desire to contribute amounts in excess of the current applicable limitations of Proposition 73.

30. To accomplish its objectives in state campaigns, the Party must obtain contributions from those groups or individuals who have a history of making large contributions to the Party, i.e., contributions in excess of the $2,500 limit contained in Proposition 73.

31. The 1990 budget of the California Democratic Party was developed by the Party's executive staff and Finance Committee, after input from members of the entire Executive Board, and was approved after a public hearing by the Executive Board at its January 1990 meeting.

32. In February of 1989, the California Democratic Party was $200,000 in debt.

33. To comply with 11 C.F.R. § 106.1 and federal limits on union and corporate contributions, the California Democratic Party has established separate federal and state operating accounts. Only federally-qualified contributions are deposited into the federal operating account. Money from the federal account sufficient to account for approximately 30% of total expenditures for operating expenses is transferred into the state operating account, from which all operating expenses are actually paid. Although state law permits the California Democratic Party to accept contributions of any amount to pay for operating expenses, in fact, the Party must use contributions of under $5,000 to pay for 30% of its operating expenses. As a result, a significant portion of the money raised from small contributions that could otherwise be

used for candidate support must be allocated to operating expenses.

34. If the Party is precluded by Proposition 73 from accepting contributions in excess of $2,500 to fund its proposed absentee ballot and get-out-the-vote activities, it will not be possible for the Party to provide support for its candidates at the same level that it did in the special election for the 27th Assembly District.

35. Since the effective date of Proposition 73, the California Democratic Party has received contributions of $10,000-$25,000 from unions in order to conduct voter registration.

36. In 1989, the Party raised in contributions a net amount of approximately $1.9 million, of which approximately $1.4 million was from contributions in amounts greater than $2,500.

37. Of the approximate $1.4 million raised by the Party from contributions in excess of $2,500, approximately $.5 million was contributed by unions or their controlled PACs.

38. The California Democratic Party has raised over $2.5 million since the passage of Proposition 73.

39. The California Democratic Party since the passage of Proposition 73 has solicited registered lobbyists for contributions.

40. It is an objective of the California Democratic Party to broaden the number of contributors to a campaign.

41. In California elections, Democratic turnout has historically been lower than Republican turnout, both at the polls and through absentee ballot mailings.

42. The California Democratic Party has conducted voter registration drives that, prior to the passage of Proposition 73, have not been reported as contributions attributable to a candidate.

43. The California Democratic Party does not have a program specifically designed to provide financial support to racial and ethnic minority challengers in legislative or other races in the State of California.

44. The California Democratic Party has engaged in voter registration drives that were not candidate-specific.

III. GOVERNMENTAL INTERESTS SERVED BY PROPOSITION 73[1]

45. The primary governmental interest assertedly served by Proposition 73 is to limit the amount of money spent in political campaigns in California.

46. Another interest assertedly served by Proposition 73 is to reduce corruption in the California political system.

47. Another interest assertedly served by Proposition 73 is to reduce the appearance of corruption in the California political system.

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[1] For the reasons set forth in the court's opinion, I believe these matters are properly characterized as "Conclusions of Law."

48. Another interest assertedly served by Proposition 73 is to reduce the public perception of undue influence by contributors of large amounts of money.

49. Another interest assertedly served by Proposition 73 is to enlarge the number of contributors to political campaigns for public office in California.

IV. CAMPAIGN CONTRIBUTIONS

50. In the course of a campaign for elected office, spending money is ordinarily necessary in order to communicate the candidate's message to the voters.

51. A candidate who relies on individual contact with voters through such means as walking districts or attending community functions is engaged in "retail" politics. In electoral districts over a certain size, "retail" politics is not feasible for election campaigns. Instead, the candidate must spend money on advertising and mailing to voters.

52. Proposition 73's campaign funding provisions will have the greatest effect on races for offices with large constituencies, *i.e.*, statewide races, state legislative races and some supervisorial races, with the possible exception of the governor's race.

53. As a result of inflation, the $1,000 campaign contribution limit approved in *Buckley v. Valeo*, 424 U.S. 1 (1976), is worth approximately $400 in current dollars.

54. Over the past 14 years the cost of campaigning has exceeded the rate of inflation and has increased roughly 170% in real dollars.

55. A $1,000 contribution today can provide for a campaign approximately what $235 would have been able to provide when *Buckley v. Valeo* was decided. ($400 = 170% of $235.) Put differently, it would take approximately $3,800 in current dollars to buy what $1,000 could buy a candidate in 1976.

56. Organizations with members who can afford to make large contributions can, and sometimes do, encourage members to independently contribute up to the $1,000 limit to a particular candidate.

57. Plaintiff SEIU's membership is composed of employees in low-wage service trades who cannot afford to make large independent contributions.

58. SEIU/COPE has in the past made contributions to candidates in excess of limits now imposed by Proposition 73. SEIU/COPE wishes to continue doing so.

59. Plaintiff SEIU/COPE gave approximately $21,000 in campaign contributions in 1987, and $120,000 in campaign contributions in 1989.

60. Prior to Proposition 73, plaintiff SEIU/COPE gave $40,000 to candidate David Roberti, $21,000 to candidate Willie Brown, $30,000 to candidate Bob Epple, and $25,000 to candidate Cecil Green.

61. In 1986, SEIU/COPE gave a higher dollar amount in campaign contributions to incumbents than challengers.

62. In 1988, SEIU/COPE gave a higher dollar amount in campaign contributions to incumbents than challengers.

63. In 1988, SEIU/COPE gave a higher dollar amount in campaign contributions to non-minority candidates than minority candidates.

64. When plaintiff SEIU/COPE gives a campaign contribution, it intends the candidate to use it for political purposes and not for officeholder expenses.

65. Plaintiff SEIU/COPE is not concerned about public perception that their campaign contributions might be given for the purpose of unduly influencing candidates or officeholders.

66. Plaintiff SEIU/COPE concentrates its resources in competitive elections.

67. Plaintiff SEIU/COPE encourages local unions to supply volunteers, get-out-the-vote, staff phone banks, and otherwise participate in elections.

68. Plaintiff SEIU/COPE would prefer to be able to work directly in coordination with candidate campaigns.

69. The contributions to candidates made by plaintiffs CTA/ABC and Ruby are, among other things, both an expression of the contributors' political views and an expression of their desire to associate with individuals who share those views.

70. The ceiling on contributions under Proposition 73 limit plaintiff Ruby's ability to engage in political speech, to the extent that those limits decrease a candidate's ability to disseminate the political expression supported by plaintiff Ruby.

71. Numerous factors, in addition to contributions to a candidate and his opponent, may determine the outcome of an election.

72. The source of a candidate's contributions may be relevant to some voters.

73. At least 75% of the campaign contributions made by plaintiff CTA/ABC go to incumbent legislators.

74. As a rule, CTA/ABC does not make campaign contributions to challengers in primary elections.

75. CTA/ABC contributions go mostly to non-minority candidates.

76. Members of the California Teachers Association are not advised that contributions to candidates from CTA/ABC can be used as those candidates see fit.

77. Plaintiff CTA hopes that campaign contributions to two separate candidates would not be used against each other in the case of a special election.

78. CTA/ABC engaged in independent expenditures in the special election for the 27th Assembly District because it wanted to expend more than the $5,000 contribution limitation for broad-based political committees mandated by Proposition 73.

79. In general, campaign contributors do not contribute to the campaigns of challengers until there is significant information about the challenger's prospect for victory.

80. Incumbents tend to raise large amounts in campaign contributions regardless of whether or not they need it.

81. Factors which determine how much in contributions a challenger is able to obtain include how firmly entrenched the incumbent is, the quality of the challenger, and the personal wealth of the challenger.

82. In general, under Proposition 73's limits, candidates will likely be required to spend more time raising money. At least some candidates may be required to solicit funds from a larger number of people.

83. As to certain candidates, the effect of the contribution limits established by Proposition 73 is to substantially reduce the amount of funds directly available to them to be spent in election campaigns. This substantially decreases the amount of political speech in which such candidates can engage.

84. Proposition 73's contribution limits have reduced and in the future will reduce spending on campaigns.

85. A system of contribution limits in San Francisco substantially decreased spending on campaigns. Spending on federal congressional campaigns in California has also decreased because of the federal contribution limits.

86. In the special election held in 1989 for the 33rd Senate district in California, after the passage of Proposition 73, both candidates combined spent only 22% of what was spent in a special election race held in 1987 for the 39th Senate district, before the passage of Proposition 73.

87. In the three general election years immediately preceding the effective date of Proposition 73, incumbents in contested California legislative races received a

greater percentage of contributions in excess of the limits established by Proposition 73 than did their challengers.

88. Under Proposition 73, a challenger for state treasurer has raised more in campaign contributions than the incumbent.

V. TRANSFERS

89. Prior to passage of Proposition 73, partisan transfers, from a party or party leadership, were a standard means of partially financing California legislative election campaigns.

90. One of the expected uses of a campaign contribution to the Speaker of the California State Assembly or the President Pro Tempore of the California State Senate is that it will be transferred to other candidates.

91. Among other reasons, candidates transfer campaign funds to other candidates in aid of the transferor's goal of attaining a leadership position in the legislature.

92. While transfers render fundraising ability an important criterion in the selection of legislative leaders, the leadership office is itself a significant aid in fundraising.

93. Fundraising for other legislators is a traditional leadership duty.

94. Transfers of contributions from party leadership may give the appearance to some members of the public aware of the practice that a candidate or officeholder will vote consistent with the wishes of the party leadership.

95. Although under certain circumstances the ultimate source of a contribution may be obscured by recruiting candidates to make contributions from their own campaign funds, in general, since dollars are fungible, no deception is worked if a candidate reports his receipt of funds from another politician's political fund.

96. In California, most partisan transfer money is focused on competitive races.

97. More partisan transfers than PAC contributions are made to competitive races.

98. Prior to Proposition 73, plaintiffs CTA/ABC, SEIU/COPE and Ruby contributed funds to candidates with the understanding that the recipient could transfer funds to a candidate who may need the money more. These contributors considered transfers of funds among candidates to be an efficient and satisfactory use of their campaign contributions. These plaintiffs wish to be able to once again make contributions without having their use restricted to a particular candidate. In the case of contributions to the Legislature's leadership, plaintiff SEIU/COPE contributes knowing that the leadership will make transfers supporting the leadership's interests, which the SEIU/COPE believes will also serve its interests.

99. SEIU/COPE gives contributions to state legislative leadership with the knowledge the leaders would use that money in competitive races.

100. Since August 1986, SEIU/COPE has not communicated directly to SEIU members that it was giving

substantial sums of money to the Speaker of the California State Assembly and the President Pro Tempore of the California State Senate without restriction.

101. The California Teachers Association made a $3,000 contribution to Assembly Republican Leader Ross Johnson, knowing he could transfer it to Republican candidates.

102. Plaintiff Allen Ruby contributes to candidates to use funds for whatever office the candidate wishes to pursue. He wishes to support the political ideas of each candidate, not necessarily their race for a particular office.

103. Plaintiff Allen Ruby also contributes to candidates with the desire that the candidate use the funds to disseminate a political message, whether that message is disseminated through the candidate's own campaign or through the campaigns of others to whom the candidate contributes.

104. Plaintiff Allen Ruby would be "disappointed" if dollars contributed to a candidate were transferred to another candidate and used for improper purposes.

105. The possibility of transfers of funds between candidates may cause and has caused certain candidates to raise greater amounts in contributions for fear of last minute transfers of funds to their opponents.

106. In the three general election years immediately preceding the effective date of Proposition 73, incumbents in contested California legislative races received more money in transfers from other candidates than their

challengers in 106 out of 146 races in which such transfers were made.

107. The ability to transfer contributions between candidates is a mechanism for incumbents to raise money and challengers to spend it.

108. Transfers of contributions to a single candidate in a multiparty, candidate primary field may give a significant advantage to that candidate.

109. In 197 contested California State Assembly races in the general elections of 1984, 1986, and 1988, 112 races had candidates who received at least one transfer of campaign contributions.

110. Out of 112 contested California State Assembly races in which a candidate received at least one transfer, in 74% of the races the incumbent received more money in transfers than the challenger.

111. In the 54th Assembly District general election in 1988, the challenger received less in transferred contributions than the incumbent, and the challenger defeated the incumbent.

112. The ability to transfer campaign contributions from one race to another race may discourage some potential challengers from entering the race.

113. A transferor of campaign contributions may be the recipient of significant sums of money from special interest groups and under such circumstance, the transferor may have an agenda reflective of the special interest who contributed to the transferor. It is equally as likely, however, that the contributions were made because the recipient had such an agenda rather than vice versa.

114. In the eight competitive state legislative races held in 1988 (see Findings No. 138, 139, *infra*), partisan transfers in excess of the Proposition 73 limits constituted more than 50% of the combined total contributions received by the candidates.

115. In the 1988 general election, of 11 members of the California Legislature identified as ethnic or racial minorities, only four received transfers of campaign funds from other candidates which would have been prohibited by Proposition 73 and, of the four, two received less than $10,000 in transfers.

116. In the 56 contested California State Senate races in 1984, 1986, and 1988 general elections, 34 of the races had a candidate who received at least one transfer which would be prohibited by Proposition 73.

117. In the 34 California State Senate races in which either candidate received at least one transfer which would be prohibited by Proposition 73, in 68% of the races the incumbent received more money in transfers than the challenger.

VI. CONTESTED RACES

118. Incumbents running for office generally enjoy a substantial advantage over challengers because they ordinarily have greater resources, name-recognition, access to the media, and a greater ability to raise money. These advantages are generally the result of their being in office and the likelihood that they will remain in power.

119. The resource advantage enjoyed by incumbent House of Representatives members is reliably estimated

to be worth between $500,000 and $1,000,000 in terms of pursuing re-election.

120. California legislators enjoy a similar resource advantage, although not on the same scale. For example, Senator Kopp spent approximately $447,000 of state funds for district staff offices from December 1987 through November 1988. Other legislators have spent more. Assemblyman Johnson receives a more extensive allowance in his capacity as minority leader, controlling more than $2,000,000 in staff and resources per year.

121. How much an incumbent spends during the election campaign is not necessarily the most important factor in determining whether the incumbent will be re-elected.

122. Because they start at a disadvantage, challengers running against incumbents must raise and spend a considerable amount of money to reach a threshold level of name recognition and image necessary to make the race competitive. Challengers who fail to raise and spend the threshold amount rarely have a chance to win.

123. A challenger who reaches the threshold amount in spending can win an election, even if the incumbent spends more.

124. Given the size of the districts and the cost of media, State Senate challengers would need, on the average, about $500,000 to reach the threshold necessary to run a competitive campaign, and State Assembly challengers would need about $375,000.

125. The marginal return that a challenger receives for increases in campaign spending is greatest at the lower level of spending and declines as more is spent.

126. At all spending levels, the marginal return that a challenger gets for additional campaign spending is larger than that of an incumbent. At the lower levels of campaign spending, a challenger's marginal return may be ten to twenty times that of an incumbent, while, at the higher levels, the challenger's marginal return may be around two and a half times that of an incumbent.

127. In general, incumbents can raise money from a wider variety of sources than challengers; accordingly, challengers frequently are more dependent on large contributions than are incumbents.

128. Incumbents raise a significant amount of their campaign funds early in an election cycle. Of the money raised in the off year, incumbents raise almost half in the first six months of the year.

129. Challengers raise very little money early in the election cycle. Most challengers do not decide to run until relatively late in the cycle because the prospects for success, which depend on national or state trends and information about the incumbent, cannot be assessed years in advance of the election. Even those challengers who decide to run early have trouble raising money because contributors will generally wait to see if the candidacy is viable, in particular whether the candidate can even win the primary, before investing in the campaign.

130. PACs and parties contribute very little to challengers prior to the primary because they want to determine whether the challengers are credible.

131. Some political action committees do not contribute to challengers in order to avoid angering the incumbent.

132. In California congressional races in 1988, incumbents outraised challengers by 9 to 1 in the period prior to June 30, 1988, and 2.5 to 3 to 1 thereafter.

133. In state races in the off-years 1983, 1985, and 1987, all incumbents, but very few challengers, engaged in fundraising. The average incumbent also substantially outraised the challengers who did raise money in the off-year. In statewide constitutional office races in the off-years 1983 and 1985, incumbents outraised challengers by an average of almost 9 to 1. In State Senate races in the off-years 1983, 1985 and 1987, incumbents outraised challengers by an average of more than 40 to 1. In State Assembly races in the off-years 1983, 1985 and 1987, incumbents outraised challengers by an average of more than 70 to 1.

134. Defendant-intervenor Kopp raised $263,000 in 1989 for his 1990 State Senate campaign. As of the date of trial, Senator Kopp was unaware of any opposition to his candidacy.

135. Money raised early in an election cycle is generally worth more to the candidate than money raised later on because the early money can become seed money used to raise more money.

136. Since 1972, the gap between what is raised by incumbents and what is raised by challengers in congressional races has steadily grown, going from an initial ratio of about one and one-half to one to close to five to one.

137. In the general elections of 1984, 1986, and 1988, there were 197 races that had at least two candidates running for a seat in the California State Assembly.

138. Political science literature defines "competitive races" as those where the winner received 55% of the vote or less. This is a reasonable definition.

139. In 1988, in the eight so-defined competitive legislative races, challengers raised an average of 81% of their campaign money after the primary.

140. In 1988, in the eight competitive legislative races, challengers raised an average of 82% of their money from contributions in excess of those that would have been permitted under Proposition 73's campaign funding provisions, while incumbents raised an average of 52% of their money from such contributions.

141. Prior to Proposition 73, transfers in California have frequently been used to support challengers and help them reach the threshold to make a campaign competitive.

142. Incumbents in state legislative and constitutional offices are disproportionately white and male.

143. Because it has a cumulative adverse effect upon the ability of challengers to raise funds, Proposition 73 will have the tendency of adversely affecting the

chances of minorities and women to be elected to public office.

144. Transfers from established officeholders are often necessary to help a minority challenger begin a campaign.

145. Willard Murray, the first black assemblyman to win election in his majority white district, received large amounts in transfers from other candidates to help his campaign.

146. Minority challengers have difficulty raising funds for election campaigns because of negative stereotypes, and because minority supporters are often economically underprivileged.

147. There is pressure on plaintiff SEIU/COPE to respond to the incumbents, even if they are not seriously challenged.

148. Proposition 73 does not prevent a challenger from entering a race and then withdrawing from the race.

149. Out of the 55 California State Senate races of 1984, 1986, and 1988 in which a candidate received at least one contribution over the limits established in Proposition 73, in 55% of the races incumbents received a greater percentage of their campaign contributions over the limits established by Proposition 73 than the challengers.

150. Out of 190 California State Assembly races in 1984, 1986, and 1988 in which at least one candidate

received at least one contribution over the amounts established in Proposition 73, in 69% of the races the incumbent received a greater percentage of contributions over the Proposition 73 limits than the challenger.

151. Proposition 73's contribution limits will frequently discriminate against challengers in state legislative races and statewide races, with the possible exception of the governor's race, and thereby decrease competition.

152. In the context of California politics, Proposition 73's campaign funding provisions, taken as a whole, are mutually reinforcing in their adverse effect upon challengers and will tend to have the effect of reducing meaningful competition for public office in California.

VII. THE FISCAL YEAR PROVISIONS

153. The fiscal year structure of Proposition 73 divides a two-year election cycle into three contribution periods: 1) early in the cycle is the one-year period that includes the first six months of a non-election or off-year; 2) the middle of the cycle includes the last six months of the off-year, plus the six months prior to and including the June primary; 3) the end of the cycle is the fiscal year beginning July 1 of the election year and includes the general election.

154. While as a theoretical matter, use of a fiscal year as the measuring period for limitations on campaign contributions could result in an advantage to a potential challenger because immediately after the election an

incumbent may have received the maximum amount possible from a given contributor base, and a potential challenger can begin immediately to raise funds, as a practical matter, such a scenario is not the likely one.

155. Proposition 73's use of contribution limits keyed to the fiscal year, rather than to particular elections, tends to discriminate against challengers by exacerbating the discrimination inherent in the limits themselves.

156. One effect of Proposition 73's fiscal year limits and transfer ban will be to adversely affect the ability of challengers, particularly late challengers and minorities, to compete against incumbents.

157. Under Proposition 73, if a local jurisdiction holds two elections within the same fiscal year, then contributors may be excluded from contributing to the candidate for the second election.

158. Plaintiff SEIU endorsed a candidate for a local school board election in Los Angeles, and plaintiff SEIU/COPE gave the candidate the maximum contribution for the fiscal year in the primary. SEIU/COPE was unable to contribute to the runoff election, because it took place in the same fiscal year. In such situations, Proposition 73 totally forecloses a contributor from participation in a particular election.

VIII. UNIONS' INTERNAL COMMUNICATIONS

159. Plaintiff unions endorse candidates for office whom they judge will advance the interests of the union and/or its members.

160. In the past, each of the plaintiff unions has consulted with a candidate or the candidate's campaign staff prior to making the decision about whether or not to endorse that candidate in the upcoming election.

161. Plaintiff unions disseminate endorsements of candidates to their members through newsletters, mailings to members, membership meetings and open forums for members to meet a candidate or candidate.

162. CTA staff meets with candidates for statewide office whom the union may wish to endorse in order to determine the candidate's views on issues of importance to CTA and its members.

163. After it decides to give an endorsement, plaintiff CTA/ABC sends mailings to members letting them know of endorsement of statewide candidates.

164. In two recent special elections for state legislative seats, CTA/ABC contributed the maximum amount to each of the Democratic candidates, and sent mailings to its membership endorsing each of the candidates.

165. CTA/ABC usually conducts at least one or two statewide mailings to membership in connection with statewide elections and would like to do so for the upcoming 1990 statewide elections.

166. A mailing to CTA's membership costs over $26,000.

167. When it endorses a candidate, plaintiff CTA does more than just communicate its support of the candidate. It also conducts get out the vote activity among its members and conducts an internal political campaign on behalf of the endorsed candidate.

168. Plaintiff CTA's opinion is that if it conducted its internal political campaigns entirely independent of the candidate, it would not be using its resources effectively. It therefore wishes to be able to coordinate its expenditures with the candidate.

169. The SEIU board of directors interviews candidates for statewide and legislative office who are recommended for endorsement in order to determine whether or not to endorse.

170. SEIU has in the past communicated its endorsements to members through newsletters and mailings sent and paid for by the union. Plaintiff SEIU discontinued its regular newsletter to members in 1986 because it determined that its newsletter was an ineffective means of communicating with members.

171. SEIU plans to communicate its endorsement of and information about candidates in the 1990 elections through at least one statewide mailing to its members. SEIU also plans to carry out its endorsement of candidates by conducting a "get-out-the-vote" campaign on behalf of particular candidates among its members.

172. A mailing to SEIU's membership would require expenditures in excess of the $1,000 contribution limit imposed on SEIU. Even if SEIU's political action committee paid for the mailing, the costs would exceed the $5,000 PAC limit.

173. The union communication ban has a chilling effect on communications between union leadership and

candidates because union leaders fear that any communication would render subsequent membership communications illegal contributions.

174. Under Proposition 73, a mailing to union members has been construed to be a contribution if the mailing was done in coordination, or after consultation, with a candidate. Because mailings to membership cost more than the amount of the contribution limits, plaintiff CTA is either discouraged from speaking to candidates, or cannot spend funds on mailings to members endorsing a candidate whom it has interviewed for endorsement.

IX. CORRUPTION AND THE APPEARANCE OF CORRUPTION

175. There have been no studies done in California on the correlation between campaign contributions and votes of legislators. The studies done in the federal system since the enactment of the FECA show that there is no significant correlation. The results of these studies have some application at least to campaign contribution regulation schemes containing individual limits of up to $5,000.

176. The conclusions which have been arrived at by scholars concerning the corrupting effect of contributions under a system of limitation of campaign contributions do not necessarily apply when campaign contributions are unlimited.

177. Large campaign contributions may unduly influence elected officeholders.

178. In general, the higher the amount of the contribution, the more opportunity for undue influence over the candidate or legislator.

179. No evidence was tendered which demonstrated that any particular legislator had been unduly influenced by any particular contribution.

180. No evidence was offered to show that transfers of funds among political candidates and officeholders had corrupted any officeholder or given rise to any corruption.

181. A ban on the transfer of funds by a candidate between his or her own campaign committees does not address the goal of eliminating corruption.

182. Assemblyman Johnson sincerely believes that there have been instances of political corruption in his house of the California Legislature, but he is unable to testify as to a single instance or the frequency of such conduct. He is not aware of any facts to report to appropriate authorities concerning such criminal activity.

183. Senator Kopp's testimony is of a similar character.

184. The court take [sic] judicial notice that a non-party former state senator was convicted in this district for activities which may be characterized as using his office for personal gain. This appears to have involved honoraria rather than campaign contributions.

185. The record of actual corruption in this case is evanescent.

186. Transfers by candidates to candidate-controlled ballot measure committees does not give rise to an appearance of corruption.

187. A very large contribution given by a person who has an interest in the actions of a candidate or officeholder may give rise to an appearance of corruption.

188. A contribution given under circumstances suggesting that the recipient's conduct was influenced by the contribution gives rise to an appearance of corruption.

189. There is a public perception that corruption may arise from the giving of large campaign contributions to elected officials from individual contributors. The larger the amount of a contribution, the greater the potential public perception of the possibility of undue influence.

190. There exists a general public perception that elected officials are far more responsive to the wishes of large campaign contributors than non-contributors.

191. There is a public perception that the political process in California is to some extent corrupt. The record evidence to support that public perception is evanescent.

192. There are historical instances in which political parties were the vehicles for corruption.

193. Corrupt practices legislation, greater sophistication on the part of the press, political candidates and party officials suggest that while the potential for use of the party to corrupt still exists, it is significantly less likely to serve those purposes today. That is particularly

so, since PACs provide a direct means by which special interests may make contributions, and potential corruptors may succeed by arranging the "bundling" of contributions directly to candidates.

194. Proposition 73 will encourage PACs and the "bundling" of contributions by lobbyists.

195. The accumulating of individual contributions by political parties for the purpose of making their own expenditures may combat corruption and the appearance of corruption since the candidate may not know precisely where the money originally came from.

196. The public perceives there is too much money being spent on political campaigns.

197. There is insufficient evidence to determine if there is a public perception that the Board of Equalization is impartial in dealing with large taxpayers as against small taxpayers because of campaign contributions given to Board members.

198. There is insufficient evidence to demonstrate that transfers of contributions between candidates have damaged the reputation of the California Legislature.

199. Campaign disclosure requirements have been in effect in California for 15 years.

200. To the extent that it fosters a preoccupation with fundraising, Proposition 73 may increase, rather than decrease, the public's perception of the appearance of corruption.

X. LESS RESTRICTIVE ALTERNATIVES

201. Proposition 73's contribution limits substantially burden speech and associational activity.

202. There is no evidence in the record to justify any of the amounts set as contribution ceilings.

203. Limits on campaign contributions that are indexed to inflation would permit candidates and contributors to make and accept contributions at a level that would not decrease in value with the passage of time.

204. Use of limits tied to the election cycle, as done in the federal system, rather than to a fiscal year, would be a less restrictive alternative. Defendants provided no evidence that the more restrictive fiscal year structure is necessary to serve any purpose of the act. To the extent that the purpose of the fiscal year is to allow more funds to be raised in races that are run every four years, the contribution limit could simply have been doubled for those races, avoiding the burdens on challengers imposed by keying limits to a fiscal year.

205. The goal of ensuring that the contributor is protected from unintended use of his or her campaign contributions can be met by a less restrictive alternative. A system that requires candidates to notify potential contributors of the uses to which campaign contributions will be put would adequately serve that goal, as would a system that allows contributors to restrict the uses to which their contributions may be put.

206. Allowing a candidate-controlled committee to contribute to candidates in amounts permissible for political action committees would be less restrictive than a

complete ban. A contribution from a candidate controlled PAC is not more corrupting than a contribution from a PAC controlled by a business.

207. Campaign contribution disclosure may provide information which alerts the voting public to the appearance of corruption.

208. A less restrictive and far more effective means of curbing corruption and the appearance of corruption in the electoral process is in the public financing of campaigns.

DATED: 9/25, 1990.

/s/ Lawrence K. Karlton
LAWRENCE K. KARLTON
CHIEF JUDGE EMERITUS
UNITED STATES DISTRICT COURT

Supreme Court, U.S.
FILED
JUN 8 1992
OFFICE OF THE CLERK

No. 91-1778
No. 91-1787

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

FAIR POLITICAL PRACTICES COMMISSION,
QUENTIN L. KOPP AND ROSS JOHNSON,
Petitioners,
VS.
SERVICE EMPLOYEES INTERNATIONAL UNION, et al.,
Respondents.

Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is proof of discriminatory intent required to establish that Proposition 73's discriminatory fiscal year contribution limit scheme violates the First Amendment, where as the district court found, it gives incumbents a four to one fundraising advantage over challengers?

2. Did the circuit court err in affirming the district court's finding of fact that Proposition 73's fiscal year contribution limit scheme discriminated against challengers?

3. Is a statute that prohibits a candidate from transferring funds between the candidate's own committees an unconstitutional expenditure limit?

4. Is a statute that prohibits a candidate from transferring funds to other candidates' committees unconstitutional when the prohibition was designed to prevent circumvention of now invalidated contribution limits and when the statute forbids all transfers, not just transfers in excess of the contribution limits?

5. Is a statute that prohibits a candidate from supporting or opposing candidacies for elected office with campaign funds raised prior to January 1, 1989 an unconstitutional expenditure limit and are efforts to revive that statute now moot?

PARTIES

Respondents agree with the lists of parties of petitioner California Fair Political Practices Commission (hereinafter "FPPC") and petitioners California State Senator Quentin Kopp and State Assemblyman Ross Johnson (hereinafter "Kopp and Johnson") except to the extent that the FPPC identified petitioners Kopp and Johnson as respondents before this Court.

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For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Respondents agree with both petitioners' explanations of the opinions below. The opinion of the Court of Appeals for the Ninth Circuit is reported at 955 F.2d 1312, and is reprinted in the Appendix to the Petition for Writ of Certiorari of FPPC (hereinafter "FPPC Pet.") at A-1 through A-36.

The opinions of the United States District Court for the Eastern District of California are reported at 721 F.Supp. 1172 and 747 F.Supp. 580, and are reprinted in the Appendix to the FPPC Petition at A-70 through A-88 and A-37 through A-69, respectively. Respondents use the page numbers in the Appendix to the FPPC Petition to cite these opinions in this brief.

JURISDICTION

Respondents agree with the statements of jurisdiction of both petitioners except to the extent that the FPPC states that respondents appealed the district court's decisions to the United States Court of Appeals for the Ninth Circuit.

STATUTES INVOLVED

Respondents agree with both petitioners' statements of the statutes involved.

STATEMENT OF THE CASE

Respondents concur with the statements of the case of both petitioners except as follows. With respect to the FPPC's statement:

1. Respondents disagree with the FPPC's characterization of the litigation below regarding Proposition 73's so-called "carry-over provisions." Cal. Gov't Code § 85306. FPPC Pet. at 7-8. Although Kopp and Johnson argued to the courts below that section 85306 would assure equal opportunity to challengers, their primary argument was that section 85306 would eliminate "corruption or the appearance of corruption." FPPC Pet. at A-82 n.8. Although the district court rejected Kopp and Johnson's level playing field argument, this was not the principal reason that the court struck down the provision. *See id.* at A-82 - A-86.

2. Respondents disagree with the FPPC's characterization of the basis for the lower courts' holdings regarding Proposition 73's contribution limits. The district court held Proposition 73's fiscal year contribution limits unconstitutional because it found that they actually discriminated against challengers. FPPC Pet. at A-60. The Ninth Circuit affirmed the district court's findings. *Id.* at A-12.

3. Respondents disagree with the FPPC's characterization of the basis for the Ninth Circuit's striking down Proposition 73's prohibition on transfers of campaign funds from one candidate's campaign committees to the committees of another, the so-called "inter-candidate" transfer ban. The Ninth Circuit struck down

the ban for two reasons. First, the ban did not serve the purpose of preventing contributors from circumventing the contribution limits because the contribution limits themselves had been declared unconstitutional. Second, the ban went beyond what was needed to serve the state's interest in preventing corruption or the appearance of corruption. *Id.* at A-24.

With respect to Kopp and Johnson's statement:

1. On August 3, 1989, Kopp and Johnson asked the Ninth Circuit by motion to suspend the district court's preliminary injunction entered on May 19, 1989. On October 2, 1989, the Ninth Circuit denied the motion.

2. Justice O'Connor denied the petitioner's first request for a stay to this Court on September 29, 1990, not September 30, 1990, as Kopp and Johnson state.

3. Petitioners requested an additional stay from Justice O'Connor on October 3, 1990, following the Ninth Circuit's denial of a stay. Justice O'Connor denied the request on October 4, 1990. As Kopp and Johnson state, the full Court denied Kopp and Johnson's further stay application on October 12, 1990.

REASONS FOR DENYING THE PETITION

Proposition 73 is a campaign finance scheme unique in American law. It limits contributions by *fiscal year* instead of by election, permitting early starters — almost always incumbents — to amass large sums of money but effectively prohibiting challengers from doing the same. The trial court found that challengers rarely surface early, and even when they do, they cannot attract financial support until close to the election when they are seen as credible candidates.

Proposition 73's fiscal year scheme would have allowed an incumbent elected to a four-year term in November 1990 to take $1,000 from a major contributor before July 1991; another $1,000 in fiscal year 1992; another $1,000 in fiscal 1993; and another $1,000 in fiscal 1994, all before the June 1994 primary. A typical challenger starting in the summer of 1993 could raise only $1,000 from a similar source. The challenger and the incumbent could

each take another $1,000 before the general election, reducing the state-mandated disparity only from 4-1 to 5-2. These are heavy odds. If Proposition 73 were like federal campaign law, such disparities would not exist.

The district court, after a full trial that produced 208 detailed findings of fact, enjoined Proposition 73's fiscal year scheme as a violation of the First and Fourteenth Amendments. On appeal, the Ninth Circuit affirmed the district court's decision.

Respondents have found no other campaign finance law in the nation like the fiscal year scheme of Proposition 73. Federal campaign law bases contribution limits on election cycles. No other state has a fiscal year scheme. And for good reason; in over three years of litigation, petitioners have been unable to assert any governmental interest that the fiscal year provisions themselves serve. *See* FPPC Pet. at A-20 n.13. Political science experts at trial offered nothing to commend this discriminatory fiscal year scheme over election cycle laws such as the federal model.

The FPPC and petitioners Kopp and Johnson ask this Court in separate petitions to review the Ninth Circuit's opinion below.[1] The dispute at the heart of this case is a factual one: did the district court properly find that Proposition 73's fiscal year contribution limit scheme discriminates against challengers? The FPPC asks this Court to embark on a third review of the record, after those of the district and circuit courts. This Court should refuse.

The FPPC's legal arguments and the arguments of Kopp and Johnson also do not warrant review. The petitions for certiorari challenge the district court's straightforward application of settled First Amendment principles to a particular set of facts. Petitioners point to no conflict between the circuits on any of the legal questions raised here. The petitions bring no untested issue to this Court. Three times petitioners have asked this Court or members of this Court to intervene by lifting the district court's injunctions.

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[1]The FPPC's petition is 91-1778. Kopp and Johnson's petition is 91-1787. Kopp and Johnson join in the FPPC's petition. Respondents oppose both petitions in this single brief.

Each time the Court has refused.[2] This Court should refuse once more.

Finally, the FPPC asks this Court to reverse and remand to the district court for reconsideration in light of Proposition 140, the initiative that instituted term limits for all California legislative and constitutional offices. The FPPC has offered nothing that undermines the district court's essential factual findings. Moreover, whatever the merits of the FPPC argument, petitioners may raise their claims before the district court, even after the judgment is final. *See* Fed. R. Civ. P. 60(b). The district court, intimately familiar with the factual record in this case, is best situated to determine whether petitioners can produce evidence that requires reversal of its judgment. Therefore, this Court should deny certiorari.

I

THE COURTS BELOW APPLIED THE CORRECT LEGAL STANDARD

The FPPC contends that this Court should summarily reverse the Ninth Circuit's decision because the court did not require respondents to prove intentional discrimination. FPPC Pet. at 9-10. But the cases upon which the FPPC rely demonstrate only that a showing of discriminatory intent is required when a statute is challenged on the ground that it affects a suspect class. *See City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 66-68 (1980); *Washington v. Davis*, 426 U.S. 229, 240-42 (1976).[3]

---

[2]*See supra*. p. 3; Petition for Writ of Certiorari of Kopp and Johnson (hereinafter "Kopp Pet.") at 7-8. Petitioners also have asked the Ninth Circuit to intervene on three occasions and the district court to stay its orders twice. Each time the request was denied. *Id.*

[3] The FPPC points to the Court's use of the term "invidious discrimination" in *Buckley v. Valeo*, 424 U.S. 1, 31 (1976). Nothing in that case, however, imposes an intent requirement, nor does the term "invidious" connote intent. *Black's Law Dictionary* defines the term:

> Term "invidious" in context of claim that difference in treatment amounts to "invidious" discrimination in violation of the Four-

Proof of a First Amendment violation does not require a showing of intent. For example, earlier this term in *Simon & Schuster Inc. v. Members of the New York State Crime Victims Bd.*, 112 S. Ct. 501 (1991), the Court invalidated a New York law that required that a criminal's income from works describing the crime be deposited into a fund to pay victims of the crime and other creditors. *Id.* at 504-05. The Court found that the law violated the First Amendment because it financially burdened speakers based on the content of their speech and was not narrowly tailored to achieve a compelling state interest. *Id.* at 508-12. In so finding, the Court did not require proof that the state intended to suppress plaintiff's speech. The Court explained:

> [O]ur cases have consistently held that "[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment." [Plaintiff] need adduce "no evidence of improper censorial motive." ... "[W]e have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment."
>
> 112 S. Ct. at 509 (citations omitted).

See also Arkansas Writers' Project Inc. v. Ragland, 481 U.S. 221 (1987) (invalidating discriminatory tax scheme on first amendment grounds without requiring a showing of intent); *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983) (same).[4]

> teenth Amendment, means arbitrary, irrational and not reasonably related to a legitimate purpose.
>
> *Black's Law Dictionary*, p.826 (6th ed. 1990)

This Court's use of the word in other contexts has not necessarily expressed the concept of discriminatory intent. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 216 (1982) (footnotes omitted) ("Thus we have treated as presumptively invidious those classifications that disadvantage a 'suspect class' or that impinge upon the exercise of a 'fundamental right.' ").

[4]The FPPC claims that *Minneapolis Star* and the other cases the Ninth Circuit relied upon are inapposite because each reviewed a statute that was discriminatory on its face. FPPC Pet. at 10 n.3. The FPPC is

Similarly, the Court has required no such finding of intent in First and Fourteenth Amendment cases concerning fundamental rights of political speech and association. *See, e.g., Norman v. Reed*, 112 S. Ct. 698, 705-06 (1992) (invalidating election law that impinged upon the right to create and develop new political parties without requiring showing of intent); *see also Anderson v. Celebrezze*, 460 U.S. 780, 789-90 (1983) (invalidating a statute imposing an early filing deadline for independent Presidential candidates without enquiring into intent); *Lubin v. Panish*, 415 U.S. 709, 715-18 (1974) (invalidating statute imposing mandatory filing fees for candidates to get their name on the ballot without enquiring into intent). The lower courts applied the correct legal standard.

II

THE COURTS BELOW PROPERLY FOUND THAT PROPOSITION 73 DISCRIMINATES AGAINST CHALLENGERS

The FPPC also asks this Court to review this case because it claims that the lower courts did not find that Proposition 73 actually discriminated against challengers. The FPPC claims that the lower courts found only that the fiscal year scheme "tends" to discriminate against challengers, that the lower courts were unable to explain how Proposition 73 discriminates against challengers, and that Proposition 73 actually benefits challengers. FPPC Pet. at 11-13.

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wrong. In cases involving discrimination against a suspect class, the violation of the Constitution lies in the fact that the government has treated a protected class differently *because* they are members of that class. In other words, the violation lies in the government's wrongful intent. However, the above-cited cases demonstrate that in cases involving a violation of First Amendment rights, the Constitution prohibits a burden on the exercise of those rights, whether intentional or not. It does not matter whether the burden on those rights is clear from the face of the statute, or merely arises from its effect. Instead, the violation lies in the simple loss of speech rights. *See Simon*, 112 S. Ct. at 509; *Arkansas Writers' Project*, 481 U.S. at 228; *Minneapolis Star*, 460 U.S. at 592.

In fact, the district court unquestionably found that Proposition 73 actually discriminated against challengers and violated the First Amendment. The district court stated:

> Proposition 73, in measuring the limitation on campaign contributions by fiscal year rather than election, unconstitutionally restricts free speech and favors incumbents against challengers, and must be found to violate the First and Fourteenth Amendments to the United States Constitution.
>
> FPPC Pet. at A-60.

After a thorough review of the record, the Ninth Circuit upheld the district court's findings:

> Thus, the testimony [at trial] provides ample evidentiary support for the district court's crucial finding that [P]roposition 73's fiscal year contribution limits discriminate against challengers as a class.
>
> *Id.* at A-12.

The district court received evidence at a six day bench trial.[5] *See id.* at A-5. In all, the court made 208 findings of fact and considered every request for findings made by the parties. See *Id.* at A-8 n.6. The Ninth Circuit exhaustively reviewed the record and the district court's findings. The findings of fact and the record clearly demonstrate that Proposition 73 discriminates against challengers.

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[5]The most compelling evidence came from two expert witnesses, Professor Gary Jacobson, the nation's pre-eminent scholar on federal campaign laws and their effect on challengers, and Professor Bruce Cain, the pre-eminent scholar on California political life. Professor Jacobson's testimony was based on his study of campaign finance and the fundraising patterns of incumbents and challengers in congressional elections. Professor Cain's testimony was based on his study of the area of campaign finance in general, and in particular on Plaintiffs' Trial Exhibit 6, a study of contribution patterns in recent California legislative and statewide races. FPPC Pet. at A-11.

The district court found that incumbents usually begin races with significant fundraising advantages over challengers.[6] Incumbents raise large amounts of money early and steadily.[7] Challengers do not.[8] Challengers depend on raising substantial sums of money just before an election.[9]

Proposition 73 grossly exacerbates the advantages of incumbency. For example, under Proposition 73, an incumbent candidate for a four-year office who started amassing funds immediately after his or her last election to the State Senate could return to each contributor five times before the next election.[10] However, Proposition 73 allows challengers at most two fiscal year periods to raise money.[11] The result is at least a five to two state-mandated fundraising advantage for incumbents.

The FPPC's argument that Proposition 73 actually benefits challengers makes no sense in this light. Even if Proposition 73 takes more money from incumbents than challengers in raw dollar

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[6]Finding of Fact Nos. 118, 132, 133 FPPC Pet. at A-107, A-110.

[7]Findings of Fact Nos. 80, 127, 128, 132, FPPC Pet. at A-101, A-109, A-110.

[8]Findings of Fact Nos. 74, 79, 129, 130, 133, 139, FPPC Pet. at A-101, A-109, A-110, A-111. The vast majority of challengers do not raise money in non-election years. Plaintiffs' Trial Exhibit 6, Appellees' Joint Supplemental Excerpts of Record (hereinafter "Appellees' Supp. Rec."), Tab B at 5-6. The keys to a challenger's success, such as an incumbent's vulnerability, are usually not evident until relatively close to an election. Findings of Fact No. 129, FPPC Pet. at A-109.

[9]This means that challengers must obtain large contributions from individual contributors, PACs, and other, more established candidates. Findings of Fact Nos. 107, 127, 139, 140, FPPC Pet. at A-106, A-109, A-111.

[10] Reporter's Transcript (hereinafter "RT") at 419-20. This translates into $5,000 from each individual contributor, $12,500 from each small PAC, and $25,000 from each broad-based PAC.

[11] RT at 418-19. As a result, the challenger could receive at most $2,000 from each individual contributor, $5,000 from each small PAC, and $10,000 from each broad-based PAC.

terms, it creates an overwhelming disadvantage for challengers at a critical level of fundraising. Proposition 73 deprives challengers of highly valuable funds but takes only excess funds of relatively low marginal value from incumbents.[12] Furthermore, the record contains ample evidence to conclude that Proposition 73 would take more from challengers than incumbents in raw dollars terms in races where it counts. The district court found that in competitive races, challengers, not incumbents, benefited more from contributions in excess of Proposition 73's limits.[13]

The trial court's factual findings are, of course, entitled to deference, and will be set aside by a reviewing court only if "clearly erroneous." Fed. R. Civ. P. 52(a); *see, e.g., Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573-74 (1985). The Ninth Circuit upheld the district court's findings after thorough review. *See* FPPC Pet. at A-8 - A-13. This Court should not review the findings again. *See, e.g., Graver Tank & Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949) (this Court "rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.").

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[12] *See* Findings of Fact Nos. 125-26, FPPC Pet. at A-109.

[13] Finding of Fact No. 140, FPPC Pet. at A-111. This finding was based on Plaintiffs' Trial Exhibit 17. Appellees' Supp. Rec., Tab D (hereinafter "Exh. 17"). In preparing Exhibit 17, Professor Cain culled all competitive races for the California Legislature in 1988, before Proposition 73 took effect. RT at 426. He examined the funds collected by both challengers and incumbents to determine when the funds were collected, whether they were transfers from other candidates or contributions, and how much candidates received from contributions that would have exceeded Proposition 73's limits. RT at 424-26, 435-36. Professor Cain found that, in six of the eight competitive races studied, it was challengers — not incumbents — who benefitted more from contributions in excess of Proposition 73 limits. RT at 432-36, 442; Exh. 17, Table I. And the vast majority of the excess contributions challengers received came after the primary election. Exh. 17, Table I. Very few of those challengers raised more than a negligible amount of funds prior to the primary. *Id.*

III

THE LOWER COURTS' INVALIDATION OF PROPOSITION 73'S PROHIBITIONS ON THE USE OF CAMPAIGN FUNDS PROVIDES NO BASIS FOR CERTIORARI

In addition to its core fiscal year contribution limits, Proposition 73 contained three separate prohibitions on the use to which campaign funds could be put. It prohibited transfers of funds between separate campaign committees of a candidate, for example, between that candidate's State Assembly committee and his or her committee for statewide office. It prohibited transfers of funds from one candidate to another or between ballot measure committees and candidates. And it prohibited altogether the use of campaign funds raised before the effective date of Proposition 73 for the very political purposes for which the money had been raised, waging a campaign for elective office.

The courts below properly struck down these bans.

A. Intra-Candidate Transfer Ban

Proposition 73 prohibits so-called "intra-candidate" transfers, transfers of campaign funds between a candidate's own campaign committees.[14] Petitioner asks this Court to grant review of this case to resolve what it terms the "important question" of whether such a transfer ban is an "expenditure" limitation. FPPC Pet. at 20-21.

The intra-candidate transfer ban is clearly an expenditure limit. Put simply, it prevents a candidate from spending lawfully raised money to enhance the candidate's prospects for winning an election. The FPPC devoted so little attention to the issue in its briefing before the Ninth Circuit that the appellate court did not even understand that the FPPC contended that the intra-candidate transfer ban was not an expenditure limitation. *See* FPPC Pet. at A-22 n.17 ("Appellants do not appear to dispute that the intra-candidate transfer ban operates as an expenditure limitation.").

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[14]Cal. Gov't Code §§ 85200, 85201, 85202(b), 85304.

Petitioners Kopp and Johnson complain that the Ninth Circuit failed to recognize a state interest in "assuring campaign contributors that funds contributed would not be raised for one office and spent for another" to justify the ban. Kopp Pet. at 23. The Ninth Circuit, however, found that even if the interest were compelling, the intra-candidate transfer ban was not narrowly tailored to achieve this purpose. FPPC Pet. at A-23. The Ninth Circuit held that the interest "could be [served] simply by requiring candidates to inform contributors that their contributions might be spent on other races." *Id.* at A-23.[15]

Petitioner has pointed to no conflict in the federal circuits or the states regarding whether intra-candidate transfer bans are expenditure limits. Indeed, federal law contains no intra-candidate transfer bans.[16]

B. Inter-Candidate Transfer Ban

Proposition 73 also prohibits so-called "inter-candidate" transfers — transfers of campaign funds from one candidate's campaign committees to the committees of another.[17] The FPPC asks this Court to determine whether such a ban is narrowly tailored to serve the compelling state interest of preventing corruption or the appearance of corruption.

The FPPC argued before the Ninth Circuit that the inter-candidate transfer ban was necessary to prevent contributors from circumventing the contribution limits. FPPC Pet. at A-24. The Ninth Circuit upheld the district court's invalidation of the

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[15]*See also id.* (quoting *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 261 (1986)) ("Concerns about the unintended use of contributors' money can be met 'by means far more narrowly tailored and less burdensome than [a] restriction on direct expenditures: simply requiring that contributors be informed that their money may be used for such a purpose.' ").

[16]Federal campaign law permits a candidate to transfer funds from a campaign fund for one office to another and to carry over funds from one election to another. RT 312, 348.

[17]Cal. Gov't Code § 85304.

transfer ban because the ban could not serve this purpose given that the contribution limits based on the fiscal year structure were unconstitutional. *Id.*

The FPPC now contends that the inter-candidate transfer ban is narrowly drawn to further the State's interest in preventing corruption or the appearance of corruption arising from large contributions made by the leadership of the state legislature. Kopp and Johnson made essentially the same argument before the Ninth Circuit. The Ninth Circuit rejected the argument because Proposition 73's inter-candidate transfer ban flatly prohibits all transfers, whether large or small. FPPC Pet. at A-24 - A-25. The ban plainly goes far beyond what is needed to address the potential for corruption that derives only from large contributions, not small ones. *Id.* The FPPC offers no reason why the Ninth Circuit's reasoning is infirm.[18]

This issue does not warrant review. Petitioner has pointed to no conflict in the circuit courts on the matter. Indeed, federal law contains no such inter-candidate transfer ban.[19]

C. The Carryover Ban

Finally, petitioners Kopp and Johnson ask this court to grant certiorari to review the lower courts' invalidation of Proposition 73's so-called "carryover ban." Proposition 73 prohibited candidates from spending funds raised prior to January 1, 1989 to

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[18]Kopp and Johnson also attempt to justify the inter-candidate transfer ban on the grounds that it prevents "last minute transfers" of money that have affected electoral outcomes. Kopp Pet. at 24. They argue that the ban promotes "challenger participation in the political marketplace." *Id.* However, as explained above, *see supra* at p. 9, these large transfers are vital for challengers to be able to compete against incumbents. *See also* Finding of Fact No. 141, FPPC Pet. at A-111. Moreover, this is the level playing field argument, soundly rejected by the Court in *Buckley*, 424 U.S. 1, 48-49 (1976) ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.").

[19]Federal campaign law permits a candidate to form a PAC and contribute subject to the limits imposed on other PACs. RT 311.

support or oppose a candidacy for elected office. Cal. Gov't Code § 85306. The prohibition applied whether or not funds were raised within limits imposed by Proposition 73. The Ninth Circuit correctly held that the ban served no compelling purpose given that Proposition 73's contribution limits were invalid. *See* FPPC Pet. at A-25.

Moreover, the issue is almost certainly moot. Since the carryover ban was enjoined on September 14, 1989, California has held three statewide elections, and cities, counties, school districts, and other local entities have held numerous other elections. It is virtually certain that no funds raised before January 1, 1989 remain in candidates' accounts.

The constitutionality of Proposition 73's carryover ban is certainly not an issue that warrants review. The FPPC did not even appeal the district court's invalidation of the carryover ban to the Ninth Circuit. FPPC Pet. at A-25. The federal system has no such carryover ban. Petitioner has identified, and we are aware of, no other state that has such a ban. Petitioner has cited no conflict in the federal circuits or the states that this Court should resolve.

IV

THE CHANGES CAUSED BY PROPOSITION 140 DO NOT WARRANT CERTIORARI

Finally, the FPPC asks this Court to grant certiorari, reverse the judgment below and remand to the district court for further consideration in light of Proposition 140. The FPPC asserts that Proposition 140, the initiative that limited the number of terms a person may serve in a California legislative or constitutional office, so altered the political landscape of California that "the relationship between fundraising and challenges to an incumbent officeholder" is now "a matter of pure conjecture." FPPC Pet. at 14.[20]

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[20]As the FPPC states, this Court denied certiorari on the state court challenge to Proposition 140 on March 9, 1992, after the Ninth Circuit decided petitioner's appeal in this case. FPPC Pet. at 14; *see Legislature v. Eu*, 54 Cal.3d 492 (1991), *cert. denied* 112 S. Ct. 1292 (1992).

This Court should deny the FPPC's request. Nothing the FPPC offers undermines the lower courts' central conclusion that Proposition 73's fiscal year contribution limit scheme unconstitutionally discriminates against challengers. Even under Proposition 140, many well-funded incumbent officeholders will seek re-election, and many under-funded challengers, dependent upon obtaining large amounts of money late in the race, will try to unseat them. In many cases, Proposition 73 would work the same discrimination against challengers because it would still permit incumbents to raise sufficient money to finance their campaigns but deny challengers an equal opportunity to reach the threshold they need.

The FPPC offers only conjecture about the effect of Proposition 140 on Proposition 73's fiscal year contribution limit scheme. This speculation does not provide the basis for reversing the lower courts' decisions, made after exhaustive argument, consideration, and review.[21] The issues petitioner raises are complex factual matters. For example, determining the effect of Proposition 140 on the discrimination Proposition 73 works against challengers would require complex statistical data and expert opinion regarding political fundraising. A court would need to determine such matters as threshold amounts of money challengers need to mount viable campaigns, the effect of Proposition 140 on the power of incumbency, and the fundraising needs and capabilities of challengers and incumbents.

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[21]Indeed the cases upon which the FPPC relies do not support granting certiorari where petitioner offers mere speculation regarding the effect of an intervening state law on the factual record upon which the lower courts based their holdings. In *Omaha Nat'l. Bank v. Nebraskans Indep. Banking*, 426 U.S. 310 (1976), the Court reversed and remanded the case in light of intervening state legislation that redefined a term that was key to the lower court's holding. *Id.* at 310-11. Unlike here, the case involved a clear change in state law that appeared to have straightforward implications for the decision for which certiorari was sought. In *Bureau of Economic Analysis v. Long*, 454 U.S. 934 (1981), the Court without explanation vacated and remanded the case in light of the Economic Recovery Tax Act of 1981. Nothing in the order suggested that changed factual circumstances served as the basis for the decision.

Whether the FPPC can produce evidence that justifies reversal or modification of the district court's decision is a factual determination that the district court, not this Court, should make in the first instance. The district court is intimately familiar with the factual record of this case after conducting the six day trial and reviewing the record to make its 208 factual findings.

The Federal Rules of Civil Procedure permit the FPPC to pursue this matter in the district court, even after final judgment, through a motion for relief from the judgment under Rule 60(b). Rule 60(b) provides in relevant part:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment [if] (5) . . . it is no longer equitable that the judgment should have prospective application; or (6) any other reason justif[ies] relief from the operation of the judgment.
>
> Fed. R. Civ. P. 60(b).[22]

The district court may modify or revoke a final, permanent injunction when a "significant change in circumstances warrants revision . . . ." *Rufo v. Inmates of the Suffolk County Jail*, 112 S. Ct. 748, 760 (1992); *see also Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 437, 440 (1976); *System Fed'n No. 91, Railway Employees' Dep't v. Wright*, 364 U.S. 642, 646-48 (1961); *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932). This Court has observed that the district court "is in a much better position to pass upon the issues presented in a motion pursuant to Rule 60(b)." *Standard Oil Co. of California v. United States*, 429 U.S. 17, 19 (1976) (quoting *Wilkin v. Sunbeam Corp.*, 405 F.2d 165, 166 (10th Cir. 1968)). In *Standard Oil*, this Court held that a district court may entertain a Rule 60(b) motion without this Court's leave. *Id.* at 17. Indeed, "the place to make a record is the district court and not the appellate court." *Wilkin*, 405 F.2d at 166.

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[22]The motion must be made "within a reasonable time" and "does not affect the finality of a judgment or suspend its operation." Fed. R. Civ. P. 60(b).

If the FPPC feels a Rule 60(b) motion is appropriate, it can make that motion. There is no need for this Court to grant certiorari and remand.

CONCLUSION

The petitions for certiorari should be denied.

DATED: June 8, 1992

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(3)

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In The

Supreme Court of the United States

October Term, 1991

CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION,

Petitioner,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

RESPONDENTS MISCHARACTERIZE PETITIONER'S CONTENTION RESPECTING THE TEST EMPLOYED BY THE LOWER COURTS

Respondent Service Employees International Union (hereinafter, SEIU)[1] suggests that Petitioner would have required the lower courts to find an *illicit motive* on the part of the voters of California in enacting Proposition 73. This is not the case.

The district court ruled, and the circuit court agreed, that Proposition 73's fiscal-year limitation on campaign contributions infringed on First Amendment political rights *because* the statute's fiscal-year accounting basis "tends to discriminate against challengers by exacerbating the discrimination inherent in the limits themselves." (FPPC Pet. at A-9; A-114, Finding 155.) However, even SEIU did not contend that Proposition 73 discriminates against challengers *on its face*; rather SEIU contended that Proposition 73 *would have the effect* of discriminating against challengers because of anticipated campaign contribution patterns.

This Court has held, in connection with campaign contribution laws, that, "[a]bsent record evidence of *invidious* discrimination against challengers as a class, a court should generally be hesitant to invalidate legislation which on its face imposes evenhanded restrictions."

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[1] For the sake of brevity, Petitioner's reference to respondent Service Employees International Union is intended to encompass all of the plaintiffs in the district court proceedings below (*See FPPC Pet. at ii*) who have joined SEIU in opposing certiorari.

(*Buckley v. Valeo*, 424 U.S. 1, 31 (1976) (emphasis added).) Nowhere in the instant case did the lower courts indicate how the fiscal-year accounting basis of Proposition 73 *invidiously* discriminated against challengers; nor has SEIU illuminated this point in its opposition to certiorari.

Not every intentional discrimination is "invidious" for purposes of the Fourteenth Amendment. (*American Party of Texas v. White*, 415 U.S. 767, 781 (1974).) As SEIU points out, the "[t]erm 'invidious' in context of claim that difference in treatment amounts to 'invidious' discrimination in violation of the Fourteenth Amendment, means arbitrary, irrational and not reasonably related to a legitimate purpose." (SEIU Br. at 5 n. 3, quoting from *Black's Law Dictionary*, p. 826 (6th ed. 1990).)

But, in all events, invidious discrimination must necessarily be purposeful, i.e., there must be both a discriminatory intent and a discriminatory effect. (*City of Mobile v. Bolden*, 446 U.S. 55, 66-67 (1980); *Davis v. Bandemer*, 478 U.S. 109, 127 (1986).)[2] Unintended, incidental differences in the *effect* of the statute are not, by definition, "invidious." Thus, where, as here, the challenged statute is facially neutral, there must be some showing of a purposefully discriminatory *application* of the statute; a showing of mere "adverse impact" is not enough to make

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[2] Invidious discrimination need not be motivated by an *illicit* purpose, if it is *at least* purposeful and results in discrimination on a suspect basis. (*see e.g., Garza v. County of Los Angeles*, 918 F.2d 763, 778 n. 1 (9th Cir. 1990) (Kozinski, C.J. concurring and dissenting).)

out a *constitutional* violation. (*Washington v. Davis*, 426 U.S. 229, 242 (1976).)[3]

Petitioner contends that where First Amendment political rights are alleged to be implicated *because* of asserted discrimination between candidates or voters – the so-called "hybrid" First Amendment situation (see FPPC Pet. at A-44) – the First Amendment is not violated unless the underlying discrimination is intentional. (See, *City of Mobile v. Bolden, supra*, 446 U.S. at 66-67 ["only if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment."].) Where, as here, the statute, *at best*, can only be characterized as having a "tend[ency] to discriminate" against a class of candidates (FPPC Pet. at A-114, Finding 155) - not because of discrimination appearing on the face of the statute, but by virtue of an anticipated pattern of

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[3] In *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987), a case relied on by SEIU (see SEIU Br. at 6), the Court considered a first amendment challenge to a statute that was discriminatory *on its face*, i.e., the statute was purposefully and patently discriminatory. (*Id.* at 224, see also, *Minneapolis Star v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983) and cases previously cited by Petitioner, FPPC Pet. at 10 n.3.) The same was true in *Anderson v. Celebrezze*, 460 U.S. 780, 789-790 (1983), also relied on by SEIU. (SEIU Br. at 7.) The question in each of those cases, then, was whether such purposeful discrimination was unconstitutional.

SEIU's reliance on *Norman v. Reed*, 112 S.Ct. 698 (1992) and *Lubin v. Panish*, 415 U.S. 709 (1974) (see SEIU Br. at 7) is misplaced. Those cases did not concern alleged "indirect" infringement with First Amendment rights *resulting from discrimination between classes* of persons – the so-called "hybrid First Amendment/Equal Protection question." (FPPC Pet. at A-144.)

contributions by voters – such unintended "adverse impact" is not unconstitutional (*Washington v. Davis, supra*, 426 U.S. at 242) and, perforce, there is no "derivative" violation of the First Amendment.

Accordingly, the petition should be granted, and the Circuit Court's decision should summarily be reversed. The lower courts improperly invalidated Proposition 73 solely because the statute might have a "tendency" to have an "adverse impact" on challengers. There was no evidence whatsoever of any intent to discriminate against challengers on the part of the voters of California, and it is undisputed that the statute does not, on its face, discriminate against challengers. Petitioner respectfully submits that, *as a matter of law*, under such circumstances, there is no violation of the Fourteenth Amendment's Equal Protection Clause and, therefore, there can be no "derivative" violation of the First Amendment political rights of candidates.

II.

RESPONDENTS' ASSERTION THAT PETITIONER SHOULD BE REQUIRED TO MOVE THE DISTRICT COURT FOR RECONSIDERATION IN VIEW OF THE ADOPTION OF PROPOSITION 140 IGNORES THE FUNDAMENTAL QUESTION OF ARTICLE III JURISDICTION

SEIU does not flatly deny petitioner's assertion that, following adoption of Proposition 140, "the political landscape of California changed dramatically, and the relationship between fundraising and challenges to an incumbent officeholder immediately became a matter of

pure conjecture." (FPPC Pet. at 14.) But SEIU does *speculate* about the impact of Proposition 140 on campaign financing: "In many cases, Proposition 73 would work the same discrimination against challengers because it would still permit incumbents to raise sufficient money to finance their campaigns by denying challengers an equal opportunity to reach the threshold they need." (SEIU Br. at 15.)

This is, of course, *pure conjecture.* As Petitioner pointed out (FPPC Pet. at 15-19), and as SEIU cannot reasonably deny, it remains to be seen whether the far more marginal advantages that incumbents now have after Proposition 140 will render Proposition 73's alleged "tend[ency] to discriminate" even more attenuated.

The enactment of Proposition 140, and this Court's denial of certiorari from the judicial challenge thereto (*Legislature v. Eu,* 54 Cal.3d 492 (1991), *cert. denied* 112 S.Ct. 1292 (1992)), necessarily raised the question whether there still existed a case or controversy within the meaning of Article III of the Constitution. Plaintiffs had alleged an unconstitutional "adverse impact" based *entirely* on prediction from data concerning election campaigns that were conducted in a dramatically different political context. Whatever predictive value plaintiffs' data may have had *prior* to enactment of Proposition 140, there can be no reasonable dispute that the data's predictive value is virtually nil *after* enactment of Proposition 140.

Significantly, SEIU does not deny that the adoption of Proposition 140 may justify dissolution of the district court injunction. However, SEIU argues that *Petitioner* should be required to prove that, following Proposition

140, the fiscal-year basis for campaign contributions no longer "tends to discriminate" against challengers. (SEIU Br. at 16.) SEIU misses the point.

Plaintiffs challenged Proposition 73 on a theory of "adverse impact," a theory which necessarily required plaintiffs to demonstrate an *actual* adverse impact. It is questionable that Plaintiffs' case presented a ripe controversy when it was filed, because of the absence of any campaign experience whatsoever under the contribution limits of Proposition 73. However, the Ninth Circuit was satisfied with the trial court's reliance on data concerning previous campaigns because of the presumed similarity of the circumstances under which future election campaigns would be conducted. (FPPC Pet. at A-13; emphasis added.)

Whether or not Article III jurisdiction was satisfied because proof of the alleged injury could be projected from prior data *collected under similar circumstances* – an issue which Petitioner does not concede – it is clear beyond question that, after adoption of Proposition 140, the political circumstances informing campaigning would likely be *quite dissimilar* (*see* FPPC Pet. at 15-19), and Plaintiffs' complaint of adverse impact was, therefore, and necessarily, *speculative and premature.*

"It is not enough that the initial requirements of standing and ripeness have been satisfied; the suit must remain alive throughout the course of litigation, to the moment of final appellate disposition." (13A Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction and Related Matters 2d*, § 3533, p. 211; *Steffel v. Thompson,*

415 U.S. 452, 459 n. 10 (1974).) Even assuming that Plaintiffs' action was ripe prior to adoption of Proposition 140, that action clearly was no longer ripe once Proposition 140 became the law.

At a minimum, therefore, the Court should summarily reverse the decision of the Ninth Circuit with directions to remand the case to the district court for the purpose of consideration whether Plaintiffs' action is premature in light of the intervening adoption of Proposition 140.

CONCLUSION

For the reasons stated herein and in the Petition for Certiorari, the Court should grant the petition and summarily reverse the decision of the Ninth Circuit Court of Appeals. The Court should base such reversal on the ground that Plaintiffs failed to prove intentional discrimination and, therefore, failed to prove a violation of the Equal Protection Clause of the Fourteenth Amendment. Alternatively, the Court should base its summary reversal on the ground that the district court must reconsider

whether, in light of the intervening adoption of Proposition 140, there remains a case or controversy within the meaning of Article III.

DATED: June 15, 1992

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